REGIONAL AND EU CHALLENGES IN THE FIELD OF COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

Regional Phase I - Detecting the Challenges / National Reports on Challenges

The following questions were sent out to the contributors:

a) Legislative framework

- To what extent does the existing legislative framework in this field (Copyright Law, specific Law on Collective Management, bylaws etc.) regulate the topic of collective rights management?
- Does the existing legislative framework represent a sufficient basis for the establishment of an efficient national system of collective rights management (overregulation, under-regulation, inconsistencies, gaps, discrepancies between "law in books" and "law in action" etc.)?
- To what extent do the developments in the field of collective rights management on the EU-level affect the national legislation in this field (e.g. decisions of the European Commission, Recommendation of 18 May 2005, CISAC-case, Service Directive from 2006, proposal for a directive on collective management of 11 July 2012 etc.)?

b) Governmental aspect

- To what extent do the relevant government bodies control the establishment of collective management organizations/CMOs (e.g. specificity of the legally prescribed conditions for the registration, level of scrutiny when examining the legal requirements of registration (high or a *pro forma* examination) etc.)?
- Does an effective and permanent governmental supervision over the activities of CMOs exist in practice (e.g. effective *ex officio* control or/and the possibility of third parties to initiate the supervision, response by the government body to the results of reporting requirements of the CMOs (meaning to submitted reports by CMOs), sanctions for CMOs in practice, revocation of the license in practice etc.)?
- Does an effective governmental control of tariffs exist (e.g. examination of tariffs by a government body, imposing of tariffs by a government body, declaring the tariffs unreasonable etc./ if not why- problems, obstacles)?
- Does an effective dispute resolution (government) body exist (with regard to disputes between all the stake holders in the field (CMOs, right holders and users)/ if not why- problems obstacles)?

- Does a sufficient level of expertise within the relevant government body(s) exist with regard to the topic and issues of collective rights management?

c) Collective management organizations/CMOs

- Do the existing CMOs on the national level meet the needs of the authors from different fields for collective management of their rights (e.g. how many CMOs in which fields (music, literature, related rights etc.) are there in the country and do they effectively perform their activities, how are the national CMOs collaborating with each other, are they "generalist"/"one-stop-shop"-types of CMOs/problems, gaps in the system etc.)?
- What are the biggest problems that the national CMOs face in performing their activities (e.g. legislative obstacles, awareness, enforcing payments, internal conflicts, corruption, insufficient governmental support etc.)?
- Have the national CMOs developed collaboration with CMOs in their field from other countries (e.g. mutual cooperation agreements, CISAC membership status, lack of recognition on the international level etc.)?
- Is there an existence of other rights management bodies (other than national CMOs) on the national territory (e.g. CELAS or similar)?

d) Competition issues

- Do the national CMOs have a legal or actual monopoly position in their specific field of activity on the national level and if yes, were they a subject of examination under antitrust or competition law by the relevant national authorities (e.g. abuse of dominant position, concerted practice/if yes, has this control been posing challenges/problems to the effective performance of collective management activities etc.)

e) Other

- Any other national particularities (legal, governmental, practical, political or other), which represent challenges/problems to the effective functioning of the national collective management system?

Albania

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a) Legislative framework

The legal framework related to the collective management organizations (hereinafter "the organizations") is composed of the following acts:

- Law no 9380, of 28.4.2005 "On the copyright and other related rights";
- Law 8788, of 7.5.2001 "On Non-Profit Organizations", as amended:
- Council of Ministers Decision no 232, of 19.4.2006 "On the Establishment and Functioning of the Albanian Copyright Office";
- Council of Ministers Decision no 760, of 1.9.2010, "On the Approval of the National Strategy on Intellectual and Industrial Property 2010-2015".

Law no 9380, of 28.4.2005 "On Copyrights and other related rights" (hereinafter "Law 9380") is approved compliant to the international conventions, more particularly compliant to the Berne Convention, updated by Directive 2004/48/EC of the European Parliament and European Council, of 29 April 2004, on implementation of the intellectual property rights. There is no doubt that Law no 9380 has marked a step forward in governing the relations of all the copyright stakeholders compared to the previous law.

But, the implementation of such law has come across two major difficulties: first, the insufficient implementation of the law, related to the fact that copyright is a new field in the Albanian civil relations, and, consequently, awareness raising of individuals and users to respect this right has been and keeps being very low. Also, copyright protection structures have been established, especially over the last years, particularly after the Albanian Copyright Office started to become operational. Through its activity, the Albanian Copyright Office has raised awareness of state institutions on the importance of copyright1, although there is still much to be done. The low awareness level on copyrights has yielded negative consequences in the activity of the collective administration organizations, because, in the context of collection of user tariffs from the individuals, these organizations do not yet have a full support by the state bodies, by the users and authors/artists. Despite the awareness raising campaign of the Albanian Copyright Office, the organizations have yet a long way to go to meet their objectives satisfactorily.

Second, Law 9380 is not very relevant to the information society. In this context, it has not fully transposed the provisions of Directive 2001/29/EC, of 22 May 2001, on the

[1] Annual Work Analysis of the Albanian Copyright Office, year 2012 (http://www.zshda.gov.al/docs/501503Muji%20Bucpapaj%20Analiza%20vjetore%20e%20zshda%202012%20-17%20janar%20mujo.pdf).

harmonization of some copyrights and other related rights' aspects in the field of information society. The law on electronic trade, currently applicable, as well as the draft-law on copyrights that is thought of replacing the current law, but which is still under negotiations, shall meet the gaps in these regards. Review and improvement of the legal position of the collective administration organizations are considered as indispensable in this draft-law.

The copyright and other related rights' title-holders exercise their rights either individually or collectively through the collective administration organizations.

The copyrights and other related rights are protected by the title-holders of these rights, by a representative of these title-holders, or by a collective administration organization, chosen by them upon their free will2.

The principle is that the authors enjoy the right to protecting their rights, thus enshrining the idea that copyrights are closely related with the author of the work. However, self-protection of author rights in the conditions of a rapid development of the information society is not easily applicable. In this context, a greater importance is attached to the collective management organizations as organizations having greater possibilities to protect and promote copyrights.

The organizations are legal persons established in the form of non-for-profit organizations3. This means that their establishment, internal organization and development of their daily activity is subject to the provisions of Law no 8788 "On Non-Profit Organizations", as amended (hereinafter "Law 8788"). According to Law 8788, non-profit organizations in Albania appear in three kinds: foundations, associations and canters. There are no legal criteria defining the manner and form of these organizations. But, given that they are composed of members who are authors, artists or producers (depending on their field of activity), we are of the opinion that organizations should take the shape of associations. They are registered at the Tirana District Court.

According to provisions of Law no 9380, organizations are established by authors, interpreters, producers and anybody else attracting interest from an artistic work4. Law limits the subject matter of their activity. Therefore, the organizations are targeted at "collecting the incomes from the use of works and distribute them to the copyright and other related rights title-holders, who have transferred these rights of administration to the organizations[5]".

[2] Article 106 of Law 9380
[3] Article 108 of Law 9380
[4] Article 107 of Law 9380.
[5] Ibid.

According to this conclusion, (i) the organizations have no other right, but that of collecting and distributing of remuneration to their members; (ii) the incomes shall be distributed only in favour of those title-holders of rights who are members of the organization.

The organization member shall be presumed as such until expression of the written declaration stating that he/she wants to leave the organization. The Law specifies nothing about the membership fee from the members. Here, we might have a conflict with Law 8788, as this Law stipulates for payment of a membership fee for the association members as well as for disciplinary measures, up to the removal from the association of the members failing to pay the membership fee on a regular basis.

b) Governmental aspect

Prior to the 2008 reform in the field of licensed activities in the Republic of Albania, the request for licensing from the organizations was immediately submitted to the Ministry charged with cultural affairs. It was this Ministry that decided at a finals stage on submission or failure thereof of the license. The role of the Albanian Copyright Office (hereinafter ACO), being a central institution depending on the Ministry in charge of cultural affairs has increased, as it is this Office controlling the documentation of the interested organizations before submitting relevant files to the Minister.

The ACO role in this licensing phase is provided for in Law no 93806 as well as in the Council of Ministers' Decision no 232, of 19 April 2006 "On the Establishment and Functioning of the Albanian Copyright Office" (hereinafter "CoMD 232").

From the above-mentioned provisions, it is not clear what form of control is exercised on the documentation by the ACO – that is it is not clear on whether it is a question of a formal control, or of rather an in-depth control. The hitherto policies show that the ACO exercises a supervisory role going beyond the formal control of documentation of subjects wishing to be licensed as collective administration organization subjects.

Law 9380 makes a difference between organizations established by interpreting/executing authors/artists and the organizations established by the television, radio companies, or producers or publishers of artistic works. Participation of authors and right title-holders in them is compulsory for the second category.

The logic of this provision is clear: to avoid cases of abuses related to copyrights, applying the general principle that the rights on the work are generated rights in the moment the work is established, not in the moment it is declared to exist or gets effectively protected.

[6] Article 108 of Law 9380.

In case it is found out that the copyright holders, or the title-holders of certain works are not members of the organizations, but, on the contrary, only their publishers or producers are members, the organization is declared null and void7. Through this provision, the lawmaker instructs the ACO and the Ministry charged with the culture affairs to not issue a license on such subjects.

The license provided to the agencies is valid for 3 years8 and is subject to renewal starting from the date of publishing of the license in the Official Journal of the Republic of Albania.

Also, Law 9380 provides for a qualitative limitation in the establishment of agencies. Thus, agencies are established according to the art branches, but no more than one organization is established for one art branch9. As demonstrated below, this item might create some problems with competition.

Lastly, Law 9380 provides for another criteria subject to control by state authorities on issues of copyrights related to the content of main clauses of the status of organizations.

Thus, the organizations status contains these provisions10:

- Values, spheres and the subject matter of the activity, as well as the determination of the administrated rights;
- The conditions based on which the organization administrates the copyrights, respecting the principle of equal treatment of these rights;
- The rights and tasks of members towards the collective administration organizations;
- Administration and representation units, attributions and activities;
- Fund of administrated works and potential asset resources;
- Applicable rules for distribution of collected incomes;
- Rules for establishing the commission by the right titleholders to cover the administration cost;
- Manner of control of the financial and economic administration;
- Their organization and operation compliant to the laws in force.

Thus far, the authorities have licensed the following organizations:

[7] Article 108, item 3, of Law 9380.
[8] Article 109, item 2, of Law 9380.
[9] Article 108, item 4, of Law 9380.
[10] Article 110 of Law 9380.

- the collective administration organizations of producer rights, pursuant to the Order of the Minister of Culture no 18, of 23 January 2012;
- the collective administration organizations of the Albanian phonogram and videogram producers' rights ("AMI"), pursuant to the Order of the Minister of Culture no 92, of 27 February 2009;
- the collective administration organizations of related rights to copyrights of interpreting and/or executing artists of audiovisual, choreographic, theatrical, drama and musical works that are audio and video recorded ("AKDIE"), pursuant to the Order of the Minister of Culture no 669, of 22 May 2008.
- the copyright administration organizations in the field of music and its mechanical records ("Albautor").

An effective supervision over the organizations is not clearly provided for in the Albanian legislation.

Regarding the tariffs for the use of the works, the organizations are obliged to submit annually to the ACO the tariffs of use of works, within the first quarter of the subsequent year11. These tariffs receive a preliminary approval and can later be notified to the public by the ACO12. These tariffs were defined by a Decision of the Council of Ministers before.

Legal provisions do not currently provide for a direct supervision regarding the organizations activity, thus leading to some negative consequences, which we shall consider in the paragraph regarding the activity of organizations. The ACO status, as well as Law no 9380, provide for some supervision of authorities on the organizations, but it is not exhaustive on the nature of control. For example, the ACO status reads that it can carry out a full administrative supervision regarding the activity of the organization, but provides no specificities as to whether the supervision is made based on complaints submitted, or is instead started ex-officio.

In this context, the ACO adopts administrative measures in case of violations by the organizations, such as for instance, failure to declare tariffs, to provide balance sheets, or incomes. The administrative measures in such cases are fines13, such as for instance a fine of ALL 5,000 for any day of delay in case of failure to declare tariffs within the set deadlines and 5% of the undeclared amount of the incomes, if incomes are not declared, or are inaccurately declared14.

[11] Article 113 of Law 9380.
[12] Article 113, item 2, of Law 9380.
[13] Article 130 of Law 9380.
[14] Ibid.

Also, the supervisory authority, namely the Minister in charge of cultural affairs, can exercise administrative supervision on the organizations, based on the organization's activity. The Minister renews their licenses every three years, thus supervising the organizations. Nature and manner of control are clarified in the provisions of the laws in force.

As shown from the legal provisions and the practice so far, the only effective control of tariffs is the obligation for the submission of user tariffs by the organizations to the ACO annually, by the end of the quarter of the subsequent year. The word "obligation" implies a control of tariffs. These tariffs are not approved by the ACO. They have a floor and a ceiling level defined by Law no 9380, according to which "the agencies are entitled to the right to ask, on behalf of the members which rights they represent, after negotiations, not less than 10 percent for the copyright from users, and not less than 3 percent on related rights of the incomes collected from the use of literary, artistic and scientific works15".

The organizations decide on the methodologies of establishment of tariffs. The Albanian Copyright Office might want to be informed of the methodology. The agencies are obligated to submit such methodologies within 10 days from receiving the request. If they fail to do so, the responsible ministry, at the proposal of the ACO, may cancel the certain organization's license. Such administrative measure is not solely applied on failure to provide information regarding tariffs, but is instead applicable on any information the ACO might ask from the organizations16.

The obligation to provide information for the organizations is the only effective means of control the authorities have on organizations.

In the general understanding of conflicts between organizations and other title-holders of copyrights, there is no administrative body in charge of resolving disputes. The court is the only responsible body to handle dispute resolution cases. This does not exclude the advisory role of the ACO regarding these conflicts. However, this role does not derive from any legal provision, but from the rules of the Statute of the Albanian Copyright Office.

An exception to such rule is only the case of cable broadcast of programmes. If a dispute arises from the parties involved in such relation, and it fails to be settled amicably, the parties do primarily address the Albanian Copyright Office. If no resolution if reached, the parties address the relevant judicial bodies compliant to the laws in force17.

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[15] Article 114 of Law 9380.
[16] Article 106 of Law 9380.
[17] Article 104 of Law 9380

Also, an exception are cases when the organizations decide to administratively complain about the fines imposed to them regarding the failure to declare incomes or tariffs they are to apply for the copyrights. If this is the case, the organizations are entitled to submit a compliant about the fine to the ACO within 10 from receiving the notification for the fine18. If their submission is rejected, the agencies are always entitled to file a case with the competent administrative court.

The Albanian Copyright Office has a special relevant department responsible for cooperating with the collective management organizations. In cooperation with different international organizations, the ACO has organized conferences and seminars with the purpose of improving the work of the people responsible for relations with organizations.

c) Collective management organizations

Organizations are rather young, except for Albautor, quoted above. Under such situation, it is difficult to have a preliminary assessment of the work of collective agencies.

That said the work practice of a couple of these agencies has really been negative.

First, regarding obligations toward members, the ACO has examined complaints for two administration organizations not paying remuneration to the members, therefore, the responsible Minister, following consultations with the ACO has decided to revoke the license for one organization and to suspend the activity of the other.

This procedure has shown that the supervisory state bodies are effectively capable to carry out an effective supervision on the agencies, and at the same time, to find out that the agencies do not always satisfy legal liabilities for their members.

Second, it has been found out that the administration organizations have abused with their rights to protect the works of authors/artists who are part of their membership by undertaking to protect some other works that go beyond their competencies. The organizations are entitled to represent their members in the administrative, civil and criminal proceedings19. Jurisprudence in this field is related with the ringtones not downloaded in the mobile phones20.

Cooperation between organizations is still in its initial stages. This is one of the main conditions of proper functioning of their activity. However, not much is done in this direction thus far.

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[18] Article 132 of Law 9380.
[19] Article 107, item 1 of Law 9380.
[20] Albautor vs Vodafone Albania Sh.A., Supreme Court, year 2010.

Regarding cooperation with foreign organizations, the Albanian collective administration organizations can transfer the copyrights and other related rights to foreign companies dealing with administration of copyrights and other related rights for same or similar branches of art, only upon a written agreement or contract signed between the parties21.

One of the biggest problems is that of implementation of legal provisions regarding copyrights.

For example, there are no effective supervision means for the violation of copyrights by copyright users and for collection of tariffs. The organizations are left "in the mercy of fate" and lack appropriate support by the state bodies to collect all tariffs. The ACO, at the quality of the state responsible authority, helps the agencies in fulfilling their mission, but the work of agencies can be done only partially if there is no cooperation with the tax bodies and state police and if the ACO does not establish a powerful inspectorate to have the proper means to supervise the process.

In addition, the supervision on distribution of the organization's incomes, after they are collected, remains still a problem. On behalf of the members whose rights they administrate, the organizations are entitled to the right to ask, on behalf of the members which rights they represent, after negotiations, not less than 10 percent for the copyright from users, and not less than 3 percent on related rights of the incomes collected from the use of literary, artistic and scientific works22. Also the collective administration organization incomes generated from the collection of a commission for representation of the title-holders are used to cover the expenses for the administration of copyrights and other related rights and for cultural purposes23.

It should however be noted that transparency about expenses is very low. For the moment, the ACO role is of a paramount importance, because, based on the user requests, the Office is the body that may ask the agencies to provide information regarding expenses and incomes of the organizations.

d) Competition issues

With regard to the monopoly position, the Law 9380 provides that the organizations shall be established only for one branch of art, specifying that no more than one organization

[21] Article 111 of Law 9380.
[22] Article 114 of Law 9380.
[23] Article 115, item 2 of Law 9380.

for a branch of art shall be established24. This does naturally lead to a theoretically monopoly situation.

There has so far been no complaint or request filed with the responsible competition authorities regarding the potentially monopoly situation created by Law no 9380.

e) Other

Albania is currently discussing on a draft-law on copyright. The draft-law reflects the need for reviewing and improving the legal position of the collective administration organizations.

In our opinion, the major topics for intervention in the new copyright law in the field of the collective administration organizations are the followings:

- It is important for the new legislation to provide that the rights for fair remuneration for the private copying of works are exercised only through the organizations licensed by the responsible Minister (Minister of Culture); in this context, it is important to provide not only for the establishment of a specific body for fair remuneration for personal use of the works, but also integrate the concept of remuneration for personal use in the Albanian law and in the practice of the organizations;
- To create possibilities to provide a license for the use of a work; such thing enables a more tangible control of incomes to be gathered after getting the license, especially when the license is given for a specific deadline;
- To increase state control on re-distribution of incomes to members, providing more supervision competencies to the Albanian Copyright Office, and stressing the importance of meetings with the members at least annually, so as to increase the organizations' responsibility to their members;
- To take temporary and preliminary measures in case the organizations file a lawsuit on violation of copyrights, so as to issue an execution order for adopting financial measures against the violator; in order to achieve this the organizations shall have the necessary legal means, such as the assistance of police, customs authorities and the ACO inspectors to put a ban to the violation of its membership rights.

[24] Article 108, item 4 of Law 9380.

Bosnia and Herzegovina

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a) Legislative framework

Similar only to a few states in Europe (e.g. Germany, Austria and Portugal), the field of collective copyright management (CCM) in Bosnia and Herzegovina (BaH) is regulated by a specific Law on Collective Management of Copyright and Related Rights25 ("LCM"). Nevertheless, a few provisions of the Law on Copyright and Related Rights26/Copyright Law (e.g. Art. 66 - capacity of CMOs to bring action, Art. 147 (2) - defining types of rights management, Arts. 186, 188 and 191 - final and transitional provisions) also tackle the topic of CCM. Moreover, the Institute for Intellectual Property of BaH27 ("IPR Institute") passed, on the basis of Art. 47 of the LCM, the Rulebook on the manner and the form for the fulfillment of conditions for the issuing of licenses to legal entities for conducting the activities of collective management of copyright and related rights ("Rulebook")28. Finally, in order to (formally) ensure the functioning of the CCM in BaH, the IPR Institute (on the basis of Art. 40 (5) of LCM) also passed the Rulebook on mediation for the purpose of concluding general agreements on cable re-transmission of broadcasted works29 and the Council of Ministers of BaH (on the basis of Art. 38 (1) of Copyright Law) issued the Decision on amounts of remuneration for private copying of works protected by copyright and of subject matter of related rights30.

At first glance, it seems that the field of CCM is thoroughly regulated in BaH. Nevertheless, the legislative framework for CCM suffers from certain deficiencies:

Particularization: The special law in the field of CCM was passed in order to regulate this topic in a detailed and comprehensive manner and at the same time prevent the "over- cluttering" of Copyright Law. However, the abolishment of the "integral" system of regulation of CCM (within Copyright law) resulted in rather excessive particularization of the legal sources (provisions on CCM in: Copyright law, special LCM, two rulebooks and one decision) governing the CCM. The rules on mediation in this field, as well as the conditions for the establishment of CMOs (Rulebook) could have been easily (and should have logically) been regulated in the LCM itself. The goal to pass a clear, unambiguous, separate and as a consequence "user- friendly" regulation in the field of CCM was not completely achieved due to this particularization.

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[25] «Official Gazette of BaH» No. 63/2010.
[26] «Official Gazette of BaH» No. 63/2010.
[27] www.ipr.gov.ba.
[28] «Official Gazette of BaH» No. 44/2011.
[29] «Official Gazette of BaH» No. 11/2011.
[30] «Official Gazette of BaH» No. 77/2011.

Inconsistencies: One of the inconsistencies in regards to the regulation of CCM within the Copyright law represents e.g. provisions of Arts. 186 and 188 (within the Final and transitional provisions of the Copyright law). The latter postpone the application of provisions on private copying levy (for a year after the entry into force of the Copyright law) and remuneration for performers and phonogram producers for communication to the public of phonograms (for after the end of the year 2013). The reasoning of the Draft of Copyright Law[31] states with regard to this solution correctly that a certain period of time is needed in order to establish a system of management/collection in both cases. It is most certain that this is the case with a remuneration right introduced in the legislation for the first time (private copying levy), whose application was postponed only for a year. In case of remuneration right with a tradition (communication to the public of phonograms), the provision of Art. 188 brought more harm than advantage to the CCM system. It effectively prevented the establishment of a CMO covering this right to collect and distribute the remuneration for a period of more than 3 years. With regard to regulation of CCM in the LCM a number of inconsistencies also exist. Some of them include e.g.: The abolishment of "provisional tariff" set by the CMO (Art. 26 in the Draft of LCM), which represented a mechanism for coping with the "tariff gap" until a general agreement with a representative association of users has been concluded, or the Copyright Council has passed its decision on tariffs. Nevertheless provisions of the LCM in force still refer to this non-existent provision/tariff and create confusion. Also, the general agreements with the representative associations of users do not play a very significant role in the practice of CCM; The agreement concluded by the CMO with "an individual user" (individual agreement) as an instrument for setting the tariff (Art. 23 (2) LCM), as an exception from the general agreement concluded between a CMO and a representative association of users that includes tariffs, is only mentioned in one Article of LCM without any further regulation.

Discrepancies between "Law in books" and "Law in action": Although burdened by certain inconsistencies, the LCM and the accompanying bylaws could represent a sufficient and appropriate basis for the establishment of a functioning system of CCM in BaH. Nevertheless, certain differences are evident between the legislation covering CCM and the activities of CCM in the country. For example, although the Copyright Council (Arts. 32-39 LCM/an independent body authorized to set an appropriate tariff, settle disputes in connection with conclusion of general agreements and examine its compliance with Copyright law and LCM) was supposed to be established within six months from entering into force of the LCM by the Council of Ministers of BaH (the IPR Institute needed to initiate the procedure 1 month after entering into force of LCM), it never did. The IP Office

[31] The Reasoning of the Draft of Law on Copyright and Related rights from 2008 (unofficial), p. 32.

in fact initiated the procedure, but according to this body, not a sufficient number of applications were received for potential members.[32]

The criteria for the establishment of CMOs set in the LCM and (especially) the Rulebook are acceptable, nevertheless, there is only one CMO (AMUS) in BaH, namely in the field of CCM of rights in musical works. The LCM offers the opportunity of establishing a CMO e.g. in the field of management of resale right and of private copying levy, which does not fulfill all the criteria prescribed by the LCM (Art. 45 LCM/"Provisional license"). Also the expectations that the LCM would initiate the establishment of (new) representative associations of users (RAU), in order for them to obtain a better negotiating position on the users' side, were not fulfilled. As a consequence, the number of individual agreements (only mentioned/regulated in one provision of LCM) exceeds the number of general agreements with RAU. There are only a few of the latter e.g. agreement with The Association of Private Radio and TV Stations BaH, The Association of Electronic Media BaH and The Association of Private Radio Stations RS,[33] or a general agreement concluded in February with The Association of Employed in the Hotel and Restaurant Industry of Republika Srpska[34]. Nevertheless, some of the latter associations cover users only from one entity of BaH, and that raises the question of their legitimacy to be considered RAU.[35]

The legislative reform in the field of copyright/CCM was concluded in 2010, so with before the Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market[36]. With regard to other documents/developments in the EU in the area of CCM, the LCM is following certain standards rather diligent whilst some others are being completely ignored.[37] E.g. the LCM prescribes an explicit legal monopoly of a CMO in a particular field of specialization (Art. 6 (3) LCM), despite of the efforts of the European Commission to introduce more competition among CMOs (especially in the Recommendation from 2005). Nevertheless, certain principles for the performance of CCM proclaimed both by the Commission and Parliament are being acknowledged in the LCM such as e.g. transparency and efficiency (Art. 7 of LCM).

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[32] Information provided on the basis of a request to IPR Institute for access to information (February 2014).

[33] See at: http://pem.ba/dokumentii/.

[34] See at: http://amus.ba/amus/vijest.php?akt_id=47.

[35] Art. 24 (1) of LCM: «...A representative association of users shall be an association which, on the territory of Bosnia and Herzegovina, represents the majority of users in the field of certain activity …"

[36] Brussels, 11.7.2012, COM(2012) 372 final. In the meanwhile the Parliament has passed and the Council of the EU has adopted the Directive in question. See: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141081.pdf.

[37] In this context, the issue of the nature of these acts/documents (binding or non binding), or of the status of BaH (signed the SAA, potential candidate for membership so far) is not being discussed.

b) Governmental aspect

The Arts. 10 and 11 of the LCM and especially the Rulebook deal with the procedure and the conditions of issuing a license to a legal entity for the performance of CCM in BaH by the IPR Institute in detail.[38] So far, a license was issued to only one CMO[39] by the IPR Institute since the LCM and the Rulebook were passed.

When examining the Decision AMUS passed by the IPR Institute it can be stated that the IPR Institute thoroughly followed the procedure for the issuing of the license in accordance with the relevant provisions of the LCM and the Rulebook and that the procedure conducted by the IPR Institute was not a *pro forma* procedure. Nevertheless, due to the bad experiences with the previously active CMOs[40] stated by the IPR Institute, with regard to the results of their business activities and the detected irregularities, perhaps a higher level of scrutiny should have been expected in this procedure. For example, the IPR Institute states in Grounds for issuing the license (2) that the Statute of AMUS[41] is in accordance with the provisions of the LCM,[42] that the membership in the CMO is (among others) regulated in accordance with the LCM and that the supervision by the members is regulated in accordance with the LCM. All of the assessments above are not quite accurate. To underline only a few examples: With regard to the membership, the Statute of AMUS provides e.g. (Art. 9) that associate membership is terminated by the cancelation of the representation by the CMO, which is based on an authorization. It also states that the member can in certain cases be excluded from membership. First of all, power of attorney does not represent a legal basis of the relation between a CMO and a right holder in

[38] The legal entities need to file a request accompanied by: a) the Statute under which the bodies and the authority thereof in carrying out the tasks of the CMO are constituted, b) names, surnames and addresses of the persons authorized to represent the CMO, indication of the number of authors who have authorized a legal entity to manage the rights in their works, as well as a list of works included in the repertoire of the CMO, d) proofs to the effect that the legal entity has appropriate premises, equipment and professional support service for the effective collective rights management, e) business plan giving a real evaluation of the scope of the total economic effect of the CCM, as well as a conclusion based on authentic documents that such legal entity will be able to carry out the activities of a CMO in an effective and economical manner, applying all the standards referred to in Art. 7 of the LCM, f) decision on entry in the Register of Associations maintained by the Ministry of Justice of Bosnia and Herzegovina (Art. 10 LCM). Further regulation on the implementation of points c), d) and e) is part of the Rulebook.

[39] Decision on the issuance of license for the collective management of right of authors in musical works «Official Gazette of BaH» No. 55/2012 (Decision AMUS).

[40] See further in the report.

[41] http://amus.ba/astra_userfiles/file/AMUS%20STATUT.pdf.

[42] E.g. the Statute of AMUS is not in accordance also with the Decision AMUS since in its Art. 40 it states that AMUS performs CCM of (among others) scene works, coreographic works, audio-visual works and moral rights, whilst the license issued by the IPR Institute is only for CCM of right in musical works.

accordance with the LCM (it is a contract, Art. 9 LCM). The cancelation of that authorization cannot lead to the termination of associate membership. The membership cannot be terminated by the CMO, since it has a monopoly position in the field of authors' rights in musical works (Art. 16 LCM) and it cannot decline the CCM to an author in its specialization.

With regard to the supervision by the members, the LCM implicitly provides (Art. 19 (1) and Art. 20) a Supervisory board as one of the bodies of a CMO in order achieve the obligation of transparent business activities and for the members to be able to perform their right to supervision (Art. 7 (1)) over the CMO. The Statute of AMUS does not include the Supervisory board.

Also, the Rulebook (Art. 13) provides detailed provisions on the fulfillment of criteria for the management of rights of foreign authors in BaH by the CMO. Among others, the statements of intent of foreign CMOs to cooperate with the applying entity play a role in the assessment of this capacity. AMUS submitted the letters of intent from SOKOJ (Serbia), PAM CG (Montenegro) and HDS ZAMP (Croatia). In its Report on the functioning of the system of CCM in BaH for 2011 (Report 2011)[43] the IPR Institute stated (p. 11) that after the Decision AMUS has been passed, the CMOs from Serbia addressed the Presidency of BaH, Council of Ministers BaH, Parliamentary Assembly and IPR Institute pressing the revocation of the decision and issuing of license to SQN. It seems interesting to observe that the same CMO [SOKOJ] issued a letter of intent to one perspective CMO and supported the issuance of license to another.

With regard to the supervision, the IPR Institute carried out an examination of the functioning of the system of CCM in BaH for the period 2005-2010 and submitted its report to the Parliamentary Assembly of BaH, which adopted the latter (Report 2005-2010).[44] The Report 2005-2010 dealt with the functioning of the previously active CMOs (SQN, Elta- Kabel, Usus and Kvantum) and the legislation in force[45] in the given period in the field of CCM. The Report 2005- 2010 stated that the authorizations granted to the existing CMOs show that their activities are partially overlapping, which created competition among them. It also assessed that the first problem that was encountered was the one of legitimacy of the CMO to act in its name and for the account of right holders in dealings with users and that the CMOs used to "cede" even the rights they did not have to users. Hence the users who paid remuneration to the CMOs for the use of subject matters of

[43] Vijeće ministara BiH, br. 05-07-3-3768'12, Sarajevo, 18.02.2013. (izvještaj od 20.12.2013.).

[44] See: http://www.ipr.gov.ba/en/kolektivne-organizacije-za-ostvarivanje-autorskih-i-srodnih-prava-en.html.

[45] Law on Copyright and Related Rights, «Official Gazette of BaH» No.7/02 and 76/06 and Regulations on Professional Criteria for the Management of Copyright and Related rights «Official Gazette of BaH» No. 10/02.

protection within its specialty were mislead about the scope of the repertoire for which they obtained rights. Another issue pointed out in the Report 2005-2010 was the one of the legal form of the CMO, and it is related to the question whether the CMO is a profit or nonprofit entity. According to the list of the CMOs authorized by the IPR Institute, „SQN" and „Elta-kabel" were limited liability companies, whereas „Uzus" and „Kvantum" were organized as associations. The Report 2005-2010 also underlined the problems of democratic approach, transparency, and efficiency of the CMOs, the limited ability (legal basis) for the control of the IPR Institute over the activities of CMOs and concluded that judging by inadequate economic effects of the CMOs' work, the system of collective management of rights in BaH hardly existed in the reporting period.[46] In the annex to the Report 2005-2010 the IPR Institute also individually assed the business activities of the 4 CMOs.[47] Consequently, the IPR Institute (partially) revoked the licenses of the 4 CMOs in 2012.[48]

According to the above, it is clear that the IPR Institute did not conduct a continuous, but an *ex post* control over the activities of CMOs for the years 2005-2010. It justified this with the lack of relevant provisions in the former copyright legislation. Nevertheless, the Law on the Establishment of the IPR Institute[49] (Art. 7 bb)) explicitly provided for the authority of the IPR Institute to conduct supervision over CMOs, however, without including detailed provisions. Since the LCM has been passed in 2010, a more "active approach"[50] with regard to supervision over the CCM and CMOs in the country, which is highly positive. Also, the IPR Institute started using its right to be present at the meeting of the assembly of the CMO through an authorized person. Nevertheless, new issues with regard to supervision of the currently active CMO seem to occur. There is no possibility to invoke the procedure of supervision of the IPR Institute by the right holders and lately there has been more than one attempt by the members of AMUS. According to the statement of this body, it conducts once a year *ex officio* supervision.[51] It seems that within this CMO intensive internal conflicts exist and a number of members are complaining about the lack of transparency, democracy and efficiency in conducting business activities as well as autocratic leadership, hence similar irregularities as in the previous system of CCM are present. They

[46] See p. 6-8 of the Report 2005-2010.

[47] E.g. with regard to bussines activities of Kvantum, the IPR Institute concluded that the association did not act in accordance with the internal act of the association, especially the statute and that it did not gain income in the period between 2006-2009, hence did not fulfill goals for which it was established for (p. 4). E.g. with regard to SQN, the IPR Institute concluded that the organization is a business entity and that it was not possible to separate between income and expenditures in the basis of CCM fro the income of the company obtained on another basis.

[48]«Official Gazette of BaH» No. 55/2012. By the issuance of license to AMUS, the licenses of SQN and Elta -kabel were revoked also in the field of management of copyright.

[49] «Official Gazette of BaH» No. 43/04.

[50] There is also a Report 2012 on the functioning of the CCM system in BaH adopted in december 2013 by the Council of Ministers at their 75 meeting, the latter is however not available.

[51] Information provided on the basis of a request for access to information (February 2014).

also state the inability to invoke their right of supervision by the members. Hence, the supervision activity of the IPR Institute needs to continue and extend to the activities of the new CMO and not be exhausted by revocation of licenses of the former CMOs.

With regard to governmental control over the tariffs, formally, as stated above (Legislative framework), the LCM prescribes the establishment of the Copyright council for this purpose. However, the latter body was never established. However, it needs to be underlined that the Copyright council is not strictly a governmental body, but an expert body, which is independent and non-biased.

For the purpose of dispute resolution, the LCM introduced mediation in the case of (dispute over) conclusion of general contract on cable retransmission and the IPR Institute, as stated above, passed the Rulebook on Mediation. However, this mechanism has not been used so far.

With regard to human resources of the IPR Institute dealing with CCM (and copyright and related rights in general), according to the statement of the IPR Institute there are 3 employees in this field,[52] however the level of their expertise is not public. The latter represents one of the essential elements of an efficient system of CCM in the country.

c) Collective management organizations

As stated above (Governmental aspects) currently only one CMO (AMUS), namely in the field of musical works, holds the license for CCM in BaH. However, some of the former CMOs (SQN for collection of private copying levy and for rights in musical works, Kvantum for right of phonogram producers and Usus for performers rights) have applied for a new license and also a new entity ("Art- Association for the collective management of rights") has applied for a license for CCM in the field of cable retransmission of audio-visual works. Some of these requests were refused by the IPR Institute (SQN for private copying levy), the others were rejected (Art) and the application of Kvantum was withdrawn. Later in 2012, Art and Kvantum applied for the second time for licenses in the same fields. According to the publicly available information, the procedures for the four licenses are still pending before the IPR Institute.[53]

In 2012 there were efforts of IFRRO to support the initiation of a CMO in the filed of reprographic rights,[54] which however did not lead to a result.

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[52] Information provided on the basis of a request for access to information (February 2014).
[53] See Report 2011, p. 8- 12.
[54] IFRRO Workshop on the Administration of Reprography in Bosnia and Herzegovina, Sarajevo, 24 May 2012.

According to the above it is clear that many areas of CCM in BaH (hence many types of right holders) remain uncovered by respective CMOs and that a certain antagonism exists in the field of CCM, especially between the former and the current CMO in the field of musical rights (SQN-AMUS). After Decision AMUS was passed, SQN (among others) initiated administration action against it before the state court (Sud BiH), which is also still pending, and submitted appeals to the Ombudsmen for human rights and to the Helsinki Committee for Human Rights.[55] The homepage of AMUS on the other hand includes denunciating information on the business activities of SQN.[56] It seems hard to escape the impression that the interests of the right holders, whose rights should be collectively managed are secondary in this conflict.

With regard to current practice of CMM is seems that the former legislative obstacles and ambiguities have been almost completely eliminated, however that the internal and external issues of CMOs have remained similar. The only CMO (AMUS) has not held a meeting of the general assembly since may 2013, although according to the Statute AMUS (Art. 19), the latter needs to be held at least twice a year. The Supervisory board was never established. The conditions for the ordinary membership are unclear, to some extent arbitrary and the procedure of admission takes too long (Art. 7/ up to 1 year). The procedures of collection and distribution are not transparent according to the number of members, and the payments of users are being conducted through the account of the Administrative service of AMUS. The authorities of the Administrative board (collision with the legislative authorities of the Assembly-adoption of general legal acts) and of the Expert office (attempts of transformation from support expert service of CMO to a "quasi governing body" of the CMO)[57] are too wide. Also, although Letters of Intent for bilateral collaboration by several foreign CMOs were issued, AMUS has so far concluded only one reciprocal contract with the Turkish CMO MSG.[58] According to the Report 2011 foreign CMOs have postponed the conclusion of reciprocal agreements until Court of BaH passes a decision in the procedure initiated by the administration action of SQN.[59] Why the latter is the case is not clear, since the license of SQN was revoked, hence this entity cannot collect remuneration for domestic or foreign right holders, despite of the possible reciprocal agreements with foreign CMOs. Another interesting fact is that AMUS holds the status of a "provisional" and SQN the status of a "member" of CISAC,[60] which also may create confusion for users and foreign CMOs.
The stated situation on the field of CCM is not favorable for already existing public misconception of the activities and purpose of CMOs in BaH.

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[55] See Report 2011, p. 10.
[56] See: http://amus.ba/amus/txt.php?id=111.
[57] See Decision on the Adoption Amendments to the Statute of AMUS from 8 May 2013 and the Decision of the Ministry of Justice of BaH rejecting the request of AMUS for the entry of changes into the Registry of Associations. From 2013
[58] See: Autorske novine, No. 7 of 30 April 2013.
[59] See Report 2011, p. 10-11.
[60] See: http://www.cisac.org/CisacPortal/menu.do?method=change&menu=tools&item=item1.

With regard to the existence of other rights management bodies in BaH, according to the information on the homepage of CELAS,[61] the latter also covers the territory of BaH. The latter is indeed possible, however cannot be confirmed due to the reluctance of this entity to share information and the fact that a new CMO in the field of music (AMUS) has been established only recently in BaH.

d) Competition issues

The CMOs in BaH enjoy a legal monopoly within their specialization (Art. 6 (3) of LCM). So far, only AMUS was subject to a procedure before the Competition Council of BaH. The Council detected in its decision from 2013[62] that this CMO has abused its dominant position by conclusion of a prohibited contract by which it directly or indirectly imposed unfair purchase and selling prices or other trading conditions which restrict competition (Art. 10 (2) a) of Law on Competition of BaH),[63] applied dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them in an unequal and unfavorable competitive position (Art. 10 (2) c)) and conditioned that the other party accepts additional obligations which, by their nature or according to commercial practice, have no connection with a subject of such contract (Art. 10 (2) d)). The contracts in question were the General contract regarding the use of musical works by broadcasting (Arts. 8, 10 and 11) and Contract on the non-exclusive transfer of right of use of musical works from the repertoire of AMUS (Art. 6, 8 and 9). The procedure was initiated by the former CMO in the field of music, SQN. While assessing the evidence, the Competition Council BaH detected that AMUS within the General agreement unfoundedly and illegally expanded its competences also on the field of protection of right of performers and phonogram producers and so with imposed the broadcasting organizations additional yearly fees also for related rights.[64] The Council also detected that AMUS provided tariff discounts in a selective manner, namely only to the broadcasting organizations that are members of the three association that are party to the General agreement and not to independent broadcasting organizations, which are over 130 in number.[65]

AMUS was fined with 5000 BAM, prohibited (among others) to perform any conduct on the relevant market that would bring broadcasting organizations, which are not members of the three associations the General contract was concluded with, in an unfavorable position on the relevant market and ordered to within 30 days amend the

[61] See: http://www.celas.eu/CelasTabs/Territories.aspx.
[62] See:http://bihkonk.gov.ba/rješenje-po-zahtjevu-za-pokretanje-postupka-udruženja-„sine-qua-non“-za-kolektivno-ostvarivanje-i-zaštitu-autorskih-i-srodnih-prava-sarajevo-protiv-asocijacije-kompozit.html.
[63] See Law on Competition of BaH: http://bihkonk.gov.ba/en/category/legislation/competition-act.
[64] See Decision of the Competition Council BaH p. 15.
[65] See Decision of the Competition Council BaH p. 17-18.

mentioned provisions of the General agreement. The latter in a manner that all registered broadcasting organizations enjoy the same conditions on the relevant market of providing services of licensing copyright for broadcasting of musical works in BaH, independent of their membership in the mentioned associations.

The reaction of AMUS[66] to this decision of the Competition Council BaH was rather surprising ("Punishment or a reward by the Competition Council???")[67]. The CMO stated among others that this decision will lead to the increase of income of AMUS from broadcasting organizations and that AMUS will initiate the same procedure before the Competition Council of BaH against SQN for applying the same clause of the general agreements. The fact that AMUS abused its dominant position and even admitted in the procedure before the Council that it entered into negotiations for the conclusion of the agreements fully aware of the fact that it did not hold a license of the IPR Institute for CCM of rights of performers and phonogram producers seems to be completely ignored by this CMO. AMUS decided not to appeal.

The abuse of dominant position in its field of specialization (relevant market of CCM of rights in musical works) that has not so far been subject to a procedure before the Competition Council of BaH can potentially also be noticed in other situations mentioned above (Governmental aspects). Namely, AMUS has so far concluded only one reciprocal contract with the Turkish CMO MSG, nevertheless, according to the statements of certain users, this CMO seems to collect remuneration from the users for the "world repertoire", mistakenly convening to the Art. 18 (1) of LCM (assumption of collective management).

[66] See Autorske novine, No. 8 of 21 June 2013.
http://amus.ba/astra_userfiles/file/AUTORSKE%20NOVINE%20 br_%208_21_6_2013_.pdf.
[67] See Autorske novine, No. 8 of 21 June 2013.

Croatia

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a) Legislative framework

In the field of collective rights management the Croatian legal framework is rather well balanced and corresponds to practical needs. The collective rights management is specially regulated in the 2003 Copyright and Related Rights Act (CRRA)68, section "IV. Managements of rights" (Arts. 154-171). There is no separate law on the collective rights management, but on the other hand it is regulated at a by-law level in the Ordinance on the Professional Criteria and Procedure of Granting Permissions for Collective Management of Rights and on Compensations for Operation of the Council of Experts.69

The collective rights management is rather comprehensively regulated. The provisions on its regulation can be systematised in several groups, where the first embraces the provisions related to activities that are considered the collective rights management and the requirements for their performance. The second group entails the provisions on certain SIPO competences in providing the collective rights management grants as well as the provisions related to the supervision over CMOs. The next group comprises the provisions on the CMOs rights and obligations in giving the authorisations for the use the management which they are authorised for and the provisions on collection of remunerations and their distribution. There are also separate provisions regulating the principles for fixing the remuneration collected by the CMOs which also include the provisions on establishing and work of the special expert body which gives its opinion on the CMO tariffs on remunerations.

Activities considered as collective rights management are in particular: granting authorization for the use of subject matters of the protection; collecting and distributing (allocating) remuneration; conducting a survey and monitoring the public use of the subject matters of protection; as well as conducting the respective procedures for the benefit of management of rights. The existing legislative framework, as can be seen in the practice, is a quite sufficient base for an effective collective rights management. Namely, the collective rights management has a quite long and strong tradition in Croatia. Even before 1991, when Croatia became an independent state, the collective rights management societies had performed that activity, and immediately after 1991 the collective rights management has been performed to the full extent. The existing system based on 2003 CRRA was developed by national experts who were very familiar not only with the current practice, existing problems and comparative systems, but also with the state administration potential. As can be seen from the existing practice and the successful work of collective management

[68] Official Gazette (Narodne novine) Nos. 167/03, 79/07, 80/11, 125/11, 141/13.
[69] Official Gazette Nos. 72/04, 151/08, 90/13.

organisations (CMO), the legal framework is well balanced and it can be considered adequate.

As the EU member, Croatia is bound to apply the compulsory acquis communautaire, which was also our obligation during the negotiation process, prior to the accession. Accordingly, in the last decade Croatia implemented in its legal order all directives and decisions that had to be implemented. The European Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services is not, by its nature, obligatory and thus it is not entirely accepted in the Croatian legislation just like in the majority of other EU member states.

b) Governmental aspect

Activities of the collective management of rights in Croatia cannot be carried out without the special authorisation of the State Intellectual Property Office (SIPO) granting such activity. The SIPO will provide the permission for collective management of rights if the conditions set out in Articles 157 and 169 of the CA and the professional criteria and procedure for granting the state permissions stipulated in Art. 2 of the Ordinance on the Professional Criteria and Procedure for Granting Permissions for Collective Management of Rights and on Compensations for Operation of the Council of Experts are met.

The authorisation may be granted only to legal persons in the form of an association which has to comply with the following conditions: a) that it has its seat in the European Union (before joining the EU the seat had to be in Croatia); b) that it has adequate premises; c) that it is engaged in the management of rights as its only activity, unless its other engagements relate to cultural or art-related activities, and to activities aiming at professional or social interests of its members; d) that it has adequate equipment and technical service with at least one employee who graduated from the Faculty of Law and is familiar with the national and international copyright and related rights, the principles of collective management of rights, and foreign languages; and e) that its technical services have good knowledge of financial and accounting regulations.

With respect to the same category of right holders, the SIPO permission can only be granted to one CMO, i.e. to the society to which the most right-holders have given their powers of attorney for the administration of their rights, and which has the most contracts on mutual representations with foreign CMOs, all in accordance with the professional criteria (Arts. 159 and 169/2 of the CRRA).

The SIPO permanently supervises the CMO's activities on yearly bases. If it finds that the CMO has failed to comply with the conditions, or if it has seriously and repeatedly violated the provisions of the CRRA the SIPO must withdraw the granted authorisation. Decisions on withdrawal are to be published in the Official Gazette of the Office in the same

manner as the decision on granting the permission. Furthermore, the CMOs are obliged to deliver annual audit report of their financial activities. According to the SIPO findings, no major irregularities have been found so far in any of the CMSs. The minor ones were timely set straight in accordance with the SIPO orders, so there was no need for sanctions.

In the Croatian legal order the control system of the CMO tariffs follows the premise that copyright (and related rights also) is a private right and thus all possible interventions are limited by the constitutional guarantee in the same way as they are limited in relation to the ownership right. Therefore, the main principle is that remuneration is regulated primarily in a contract between a CMO and a user or a society of users. Subordinately, it is paid according to tariffs independently adopted by the CMO. However, the tariffs are subject to the supervision of an independent expert body referred to as the Council of Experts on Royalties for Copyright or Related Rights (the Council of Experts). The Council of Experts is a body composed of independent experts in the field of copyright and related rights, appointed by the Government of the Republic of Croatia, whose role is to expertly assess remunerations set by the CMOs.

Although the CMO decides on the amount of remuneration according to the tariffs, there is a separate procedure for fixing the tariffs aimed primarily at increasing the users' trust in the justness of the amounts of compensation. This procedure includes prior negotiations of the CMO and the chambers/societies of users. If the negotiations fail, the justness of the tariffs proposal is reviewed by the Council of Experts. However, as the Council of Experts is not an administrative, judicial, or any other kind of governmental body its opinion is not binding. The CMO's tariffs can be challenged at a court, which will determine whether the remuneration according to the tariffs corresponds to the concrete use. Practically, the opinion of the Council of Experts, as an expert and independent body, will help the court in delivering such decisions.

The burden of proof that the amounts determined in the tariffs do not correspond to a just remuneration (or that the amount is set too high) lies with the users and their associations. The users have to pay the remuneration according to the CMO's tariffs until the court passes a decision. However, this remuneration is paid as an advance payment and if it is determined that the remuneration had been too high, the user must be reimbursed for the amount overpaid.

The procedure for establishing the CMOs tariffs is not an administrative procedure. However, the CRRA provides for a special procedure before the Council of Experts on Royalties for Copyright or Related Rights. The decision of the Council of Experts is not, by its nature, an administrative act, nor it is binding; it is only an independent expert assessment of the CMOs tariffs.

The Croatian CRRA has established the system of mediation for some specific situations. The system is carried out by the Council of Experts on Royalties for Copyright or Related Rights, which in addition to its role in the control of CMSs tariffs also acts as a mediator with regard to the access to a copyright work protected by technical protection measures and with regard to cable retransmission.

Mediation related to the access to the copyright work protected by technical protection measures (TPM) is provided in accordance with Art. 6/4 of the EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. These are cases where a user is prevented by TPMs from using a subject matter of protection, which he is permitted to use without the authorization of the right holder in accordance with the rules on limitations. The right holder is obliged to enable the user to use the copyright work in accordance with the specifically determined limitations. However, if the right holder failed to enable such a use, the user can request the Council of Experts to mediate with regard to the access to the copyright work and the use thereof in accordance with the limitation. The Council, in its role as the mediator, is not bound by any special procedural rules, but can handle the case as it finds appropriate. When the Council submits the proposal to the parties concerning the regulation of their mutual relations, and if none of the parties oppose it within three months from the receipt of the proposal, it is considered that both parties have accepted it.

This system has not proved to be efficient so far. The Council of Experts has not yet reported any such case, probably because the procedure requires a certain amount of time which the user most likely finds too extensive.

Another special case which calls for mediation relates to a cable retransmission. Pursuant to obligations in the EU Satellite and Cable Directive 93/83/EEC, a special procedure is provided should a broadcasting organization and a cable operator fail to agree on the contents of a contract on cable retransmission (Art. 163/2 of the CRRA). Each party is entitled to call upon the mediation of the Council of Experts in respect of the conclusion of this contract. Upon such a request, the Council of Experts will, as a mediator, assist the parties in achieving the agreement. However, the Council of Experts, in this case also, does not act pursuant to the rules of administrative procedure. Within the process of mediation, the Council of Experts submits the proposals to the parties. If none of the parties oppose within three months, it is considered that both parties accepted said proposal, which is then included in the contract on cable retransmission. If a party abuses the negotiation position and is not ready to complete the negotiations in good faith, it is held liable for such abuse in accordance with the general principle on the prohibition of abusing the rights and the principle of acting in good faith. In case of such conduct, one is liable for the damage caused thereby.

The service competent for collective management of rights employs persons with the sufficient level of expertise.

c) Collective management organizations

At this moment in Croatia there are eight CMOs which exercise: the rights of authors of musical works (The Croatian Composers Society - Hrvatsko društvo skladatelja HDS ZAMP); the performers rights in respect of musical and audiovisual performances (The Croatian Performers' Rights Collecting Society - Hrvatska udruga za zaštitu izvođačkih prava HUZIP); the phonogram producers' rights (The Croatian Discographic Society for the Protection, Collection and Distribution of Phonogram Producers' Rights - Hrvatska diskografska udruga Udruga za zaštitu, prikupljanje i raspodjelu naknada fonogramskih prava ZAPRAF); the rights of authors of audiovisual works and producers of videograms (The Croatian Film Directors' Guild - Društvo hrvatskih filmskih redatelja DHFR); the rights of authors of written works to the public lending and remuneration for reproduction for private use (The Croatian Writers' Association - Društvo hrvatskih književnika DHK); the rights of journalists to reproduction for a purpose of the press clipping services and the Internet portals (The Society for the Protection of Journalists' Copyright - Društvo za zaštitu novinarskih autorskih prava DZNAP); the rights of publishers to remuneration for reproduction for private use (The Society for the Protection of Publishers' Rights ZANA, Zagreb - Udruga za zaštitu prava nakladnika ZANA); the resale right (droit de suite, The Croatian Collecting Society for Fine Art "ARS CROATICA" - Hrvatska udruga za zaštitu prava likovnih umjetnika "ARS CROATICA").

The existing CMOs cover almost all fields eligible for collective management. However, the collective management of rights of photographers to remuneration for reproduction for private use is missing. The CMOs rather efficiently perform their activities, although economic recession influences the amount of collected remuneration aimed at distribution. The national CMOs have good cooperation and they often approach the users together, i.e. one of them acts on behalf and on account of others, thereby creating the one-stop-shop effect. For example, in the field of music, the authors' CMS also acts in the name of performers and phonogram producers' society. However, in some cases the conflict of interests between particular CMOs and their members is so strong that they can hardly agree on mutual cooperation. At this moment the musical performers' society (HUZIP) and the phonogram producers' society (ZAPRAF) disagree about giving authorizations and collecting the remuneration for use of musical performances via digital services. The reason is not, however, some flaw in the system but the question which society is competent to exercise the related rights pursuant to existing individual agreements. To this end there are some views expressed in the practice that the performers should enjoy unwaivable right to equitable remuneration in respect to the use via digital services, which could be exclusively exercised through the CMOs. Otherwise, the practice does not observe any serious flaw in the system.

At this point, the biggest problem is lack of public awareness about the collective management activities and negative publicity created by media appearances of users that are obliged to pay the remuneration. A large part of public does not perceive the collective management as the exercise of rights of creative individuals but rather as the industry that exists for its own sake. There is no reason for that since the CMOs are working transparently and regularly distribute remunerations to their members. The CMOs are trying to change the public awareness by engaging, with the support of their members, in different promotional activities. But their success is rather mild. In these activities they emphasize the economic benefits of the use of copyright works and related rights and compare the amount of remuneration with other costs. One of the reasons for the negative public awareness is also continued public appearance of users who failed to settle their balances, or have lost law-suits for non-payment. They complain about the seemingly inappropriate amount of their debt, which constantly grows due to the prolonged period of non-payment and pending interest rates and create in the public the wrong impression of inappropriately high remunerations. In addition, by constant lobbying the users' groups try to prove the unjustifiability of the collective management, and they have required the government to cancel or limit to the maximum the remuneration collected by the CMOs. At this point, the government has not approved such requests but rather pointed out that these remunerations are not public but private. Some attempts at cancelling or limiting the remuneration happened when the government decided to reduce the public levies from the category of the so called parafiscal levies. Namely, the users' groups attempted to include the remunerations collected by the CMOs in the parafiscal levies, but with no success since the government recognized that due not only to their private law character but also to the fact that only persons who use the relevant intellectual creations pay the remuneration, these remunerations cannot be included in the parafiscal levies. Notwithstanding the failure of these attempts, the public is constantly intrigued by the legitimacy of remunerations collected through the collective rights management. This also influences the politicians who listen attentively to their electorate. So at some point it seems that the political level also fails to understand the real meaning of the collective management.

Croatian CMOs have good international cooperation and they are, as a rule, full members of international umbrella organizations and cooperate with numerous international CMOs, primarily with those who are members of the relevant umbrella organizations. The CMO for exercising the rights of authors of musical works, the Croatian Composers Society HDS ZAMP, is a full member of the Confédération Internationale des Sociétés d´Auteurs et Compositeurs - CISAC, as well as full, voting member of the Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique - BIEM. The Croatian Film Directors' Guild DHFR is in the CISAC's audio-visual field in a probation period with the provisional status. The performers' CMO, the Croatian Performers' Rights Collecting Society - HUZIP, is a full member of the European umbrella organization AEPO - ARTIS (Association of European Performers' Organizations) as well as the SCAPR (Societes' Council for the Administration of Performers' Rights) and IPDA (The

International Performers Database Association). The phonogram producers' society (ZAPRAF) is a full member of the world umbrella organization of phonogram producers – International federation of the phonographic industry – IFPI.

At the moment in Croatia there are no collective rights management entities other than the national CMOs.

d) Competition issues

With respect to the same category of right holders, the SIPO permission can only be granted to one CMO, namely, to the society to which the most right holders have given their powers of attorney for the administration of their rights, and which has the most contracts on mutual representations with foreign CMOs, all in accordance with the professional criteria referred to in Article 169/2 of the CA (Art. 159 of the CA). Thus, the CMOs enjoy a factual monopoly regarding the rights they administer, which is a good solution for both sides - the users and the CMOs - especially in a small market like Croatia. Users, on one hand, can be assured that the CMO granted an authorization that covers the entire repertoire and, on the other hand, there is no danger that the monopoly position will be abused because the rules on setting the tariffs as well as the rules on the control of the CMOs factually prevent any abuse. The fact that the CMO represents the whole repertoire makes it possible for it to be more efficient.

The monopolistic position has not been called into question before the body competent for market competition - the Croatian Competition Agency (Agencija za zaštitu tržišnog natjecanja). Nevertheless, two procedures against the CMOs were conducted before this body. The first proceeding related to the exercise of the right to remuneration for private reproduction. The CMO was giving a special discount on the account of membership in the association of importers and distributors of IT, electronic and telecommunication products and given that the members of that association were covered by the contract between the association and the CMO, obliging them to pay remuneration - an obligation they fulfilled regularly. Upon the request of small importers, the Croatian Competition Agency found that such conduct disrupts the competition because different conditions apply to equivalent transactions and some entrepreneurs are put in a more favourable position on the market of products under the remuneration regime in relation to their competitors. It ruled that the remuneration for reproduction of copyright works for private or other personal use shall be paid under equal conditions for all entrepreneurs who are obliged to pay it.[70]

The second case related to the collection of remuneration for the rebroadcasting of musical works in TV programs in the Republic of Croatia. Upon the request of several cable distributers the Croatian Competition Agency found that there is no distortion of

[70] AZTN case no. UP/I 030-02/2008-01/41, 3. 11. 2009. Official Gazette No. 9/10.

competition if all entrepreneurs are offered the same contracts, although the negotiations with some entities lasted significantly longer, provided that the remuneration was paid for the whole period of use, i.e. that it was realized in the court proceedings. Furthermore, the Agency decided that 10% discount for one-time payment in relation to the payment in instalments does not distort the competition.[71]

e) Other issues

The CMOs have significant cultural and social roles. Art. 167.a of the CA obliges CMOs to allocate revenues to the Fund aimed at stimulating the respective artistic and cultural creativity of a predominantly non-commercial nature and cultural diversity in the respective artistic and cultural fields. This Fund has to be formed by the CMO in the rules on distribution, which have to include the rules on the amount of financial resources that should be allocated to the Fund. Additionally, the CMO should allocate to the Fund the total amount of collected remunerations that have not been distributed during a period of 5 years due to justified impossibility to allocate it to the respective right holders. Moreover, the CMO is obliged to allocate 30% of the collected private copy remunerations to the same Fund. The Fund has to be distributed to both national and foreign authors, performers, organisers of cultural events, producers of cultural events, non-commercial publishers of musical and audiovisual products as well as to similar persons, exclusively for the purpose of stimulating the respective artistic and cultural creativity of a predominantly non-commercial nature and cultural diversity in the respective artistic and cultural field. The CMO must, on a yearly basis, report to the SIPO and the Ministry of Culture on the allocations to the Fund, as well as on the distribution.

The collective management of rights in Croatia is most developed in the field of music for both the authors and performers as well as for producers of phonograms. In the field of music collective rights management has the longest tradition. In other fields the tradition is not that long, but thanks to the experiences of the collective management in the field of music, these societies function well enough as well. The collective management of rights in Croatia has been functioning quite well although there are some minor challenges in everyday business. The Croatian legal framework in the field of collective rights management may serve as a role model for an effective collective management for countries that still have not established an efficient system themselves.

[71] AZTN case no. UP/I 030-02/2008-01/21, 16.10.2010. Official Gazette No. 6/11.

Macedonia

Contributors: Dr. Jadranka Dabovik- Anstasovska and Dr. Neda Zdraveva

a) Legislative framework

The issue of the collective copyright management in the Republic of Macedonia is regulated by the Law on Copyright and Related Rights (hereinafter LCR)[72]. Specific regulation or general bylaws have not been enacted. As we will show further, a specific source of the collective management are the acts of the collective management organisations (hereinafter CMOs), not only because of their subject matter, but also due to the fact they are subject of approval by the Government.

The collective copyright management has been an issue regulated with the preceding law in the field[73] and subject of major amendments of the Law in 2013. The LCR regulated the issue of the management of the rights and which rights are to be managed collectively and set rules for the establishment, the functioning and the collection and distribution of remuneration by the CMOs. The last proved to be an issue that brought into question the functioning of the system of collective management, as stated by the Government in the proposal for the enactment of the amendments of the LCR[74]. One can also argue that the low level of awareness of the system itself by those within (the authors, users and to extend the CMOs) could also be a contributing factor to this.

In brief, the LCR provides that the holders of copyright and related rights may manage the rights provided by the LCR, inter alia collectively (jointly for several works or subject matters of related rights and for several right holders) through an organization for collective copyright management, in a manner and under conditions provided by the LCR (Art. 129(1). The collective management entails regulation of the legal matters with the users of rights, collection of remunerations for the use and their distribution, and protection of rights before state authorities and other entities (Art.129(2)). Rights that, by rule, are to be managed collectively are: Communication to the public of non-stage musical works and non-stage literary works:

- The author's right of royalty from the right of resale;
- The author's right of remuneration for public lending[75];

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[72] "Official Gazette of the Republic of Macedonia" No. 115/2010; 140/2010; 51/2011 and 147/2013

[73] "Official Gazette of the Republic of Macedonia" No. 47/96, 3/98, 98/2002, 4/2005 and 131/2007

[74] Government of the Republic of Macedonia, Proposal for the Amendments of the Law on Copyright and Related Rights, Skopje, March 2011, available at http://www.sobranie.mk/ext/materialdetails.aspx?Id=2339b4cb-99bb-4299-bc4a-5acfd191dfc4 [10.01.2014]

[75] The term 'public lending' is not specifically defined in the LCR. It is considered that it refers to the landing done by public institutions in the field of science, culture and education (libraries,

- The author's and the performer's right of remuneration for rental of phonograms or videograms;
- The performer's right of remuneration for broadcasting and other communication to the public of his performance which in itself is a broadcast or is made from a fixation;
- The performer's and the phonogram producer's right of remuneration from the single equitable remuneration for communication to the public of phonograms with performances published for commercial purposes;
- The author's and the publisher's right of fair compensation for reproduction on paper or similar carrier by photocopying or any other analogous technique having similar effects, for private use;
- The author's, the performer's and phonogram producer's right of fair compensation for reproduction of the phonogram for private use;
- The author's, the performer's and film producer's right for the reproduction of the videogram for private use; and
- The right of cable rebroadcasting of copyright works and subject matter of related rights which, as an exclusive right, is compulsory managed collectively, except the broadcasting right of a broadcaster, regardless of whether the concerned right is its own or it has been transferred to it by other right holder.

The LCR sets the bases for the determination of the remunerations for use of copyright works or subject matter of related rights, whereas it makes differences if the use is for lucrative or non-lucrative purposes, and the entity, in particular broadcasters and cable operators, which make that use. As for the users of the rights, the system differentiates the terms 'user' and 'end-user'; however, only the amendments in 2013 provide a definition of both, setting that the obligation for the payment shall not be at the end-user[76].

Lifting the burden of the payment from the end-users may increase the otherwise low public perception of the collective management and the CMOs in particular. However, it is yet to be seen how the relations between the CMOs and the users, in particular broadcasters, shall be (re)established following the amendments of the Law which sets new set of rules for the establishment of the Tariffs[77]. While the previous ones rested upon the readiness of the

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cinematheques, scientific and educational instructions), which as set by Art. 50(4) of the LCR are exempt from payment the remuneration for lending.

[76] Art. 131(3) basically defines the end-user as the consumer of the services of the user. Although good in intention, the wording is such that legal entities in these cases are to be considered as consumers which is not in accordance with the general definition of consumer included the Law on Consumer Protection („Official Gazette of the Republic of Macedonia" No. 38/2004, 77/2007; 103/2008; 24/2011and 164/2013).

[77] At one point in early 2013, the dispute between the broadcasters and a collecting society lead to boycott of the Macedonian music videos productions at the programmes of three national broadcasters.

CMOs to establish working relations and to seek and take into consideration the opinion of the users, the new ones necessitate such opinions to be obtained. While the Commission for Mediation in the field of copyright and related rights previously served as an intermediary between the CMOs and the users, now its task is to evaluate the proposed Tariffs and to recommend if they should be accepted or rejected by the Government. The level of involvement of government bodies and the Government itself is much higher by the new set of rules. Namely, the procedure for the establishment of the Tariff starts by a public call of the CMO, which includes the proposed Tariff, and where the CMO asks for an opinion from the interested parties – the users i.e. the respective associations of users i.e. their chambers. These parties are to provide an opinion on the Tariff within 30 days, and failure to do so shall be considered as their consent. Following the deadline the CMO establishes the Draft-Tariff and delivers it for opinion to the Commission for Mediation in the field of copyright and related rights, annexing the opinions provided in writing from the users, including explanations why they have been accepted or rejected. The Draft-Tariff is thereafter evaluated by the Commission, in 15 days deadline, and the opinion of the Commission is delivered to the CMOs and to the parties who provided opinion upon within the Public Call. The LCR regulates what the elements of the opinion should be (evaluation report) including evaluation of whether the Draft-Tariff refers to the rights for which the CMOs has a license; are the remunerations set by the Draft-Tariff established in accordance with the LCR; evaluation of the amount of the remunerations; as well as guidelines for further activities in the cases where there are disputes between the CMO and user(s). The Draft-Tariff is to be amended by the CMO in accordance with the opinion of the Commission and delivered via the Commission for decision by the Government on its acceptance or rejection. The Government of the Republic of Macedonia accepts or rejects the Draft-Tariff with the Decision. In the cases of acceptance it is published in the Official Gazette. Rejection of the Draft-Tariff forms ground for the Ministry of Culture to withdraw the licence granted to the CMO[78]. Since the enactment of the Law, only one of the two licensed CMOs[79] successfully completed the procedure[80]. The other one has published a Call on 17.01.2014; however, there is no publicly available data on that procedure. The deadline for the enactment of the Tariff is beginning of March 2014[81].

[78] The decision of the Ministry of Culture may be objected by initiating administrative dispute.

[79] There is still an on-going procedure for one more collecting society.

[80] Its Tariff is adopted by the Government and published in the "Official Gazette of the Republic of Macedonia" No. 186/2013.

[81] In accordance with Art.30 of the Law on Amendments of the Law on Copyright and Related Rights („Official Gazette of the Republic of Macedonia" No. 147/2013) the licensed CMOs have the obligation to publish the Call within 30 days from the day of the entry into force of the Law (05.11.2013) and within 4 months to approximate their acts and work with the revisions of the Law. Failure to do so results in the withdrawal of the licence. The conditions are provided as cumulative, so narrow interpretation would mean that there are no consequences of late publication of the Call as long as the Tariff is enacted timely.

Further amendments are introduced in respect to the acts of the CMOs and their enactment, the distribution of the collected remuneration, as well in regard to the mechanisms for oversight and control of the work of CMOs, which are, as we will see further, strengthened. In regard to the distribution of the remuneration the amendments of the LCR foresee an obligation for the CMOs to obtain and install electronic equipment for collecting data on the broadcasting at the broadcasters.

Which comparative standards in the legislation and the practice of the European Union in this field have been adopted or taken into consideration in the enactment of the legislation, although an obligation for the proposer[82] is not provided in the file pertinent to the proposal. The proposer for the version of the Law in 2010 and the amendments of 2013 quotes, in identical wording, that the solutions proposed arise from the Stabilisation and Association Agreement between the Republic of Macedonia and the European Community and its member states (SAA)[83], which in Art. 71 stipulates an obligation for the Republic of Macedonia to provide proper and effective protection and enforcement of the IP rights[84]. Both proposals also quote that there is not a single set of standards in the comparative law and in the international instruments of Copyright and Related Rights that govern the issue of collective management. For the sake of the argument in the proposal for the enactment of the LCR in 2010 it is stated that relevant provisions related to collective management are aligned with relevant provisions of the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission[85]. Which those are is not specified.

The amendments of the LCR in great deal affect the issues of the oversight and transparency of the CMOs. In the drafting of these amendments, as stated by the Government, the recommendations of the European Union were taken into consideration. Again further specification is not provided. If it refers to the EC's Progress Reports on Macedonia, such recommendations have not been included explicitly.[86] The reports of 2011

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[82] In accordance with the Rulebook of the Assembly of the Republic of Macedonia the proposer is obliged within the proposal to provide statement of concordance of the proposed act with the EU legislation. The content and the format of the statement as well as the tables of correspondence with the relevant EU act are defined by the Government with Decision ("Official Gazette of the Republic of Macedonia" No. 92/2010)

[83] Signed in March 2001, available at http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/saa03_01_en.pdf

[84] Macedonia is obliged within 5 years of coming into force of the SAA to provide the level of protection of the rights as the one existing in the Community including effective means of enforcing such rights.

[85] OJ L 248 , 06/10/1993 P. 0015 - 0021

[86] See further: SEC(2010)1332 , p. 37-38, http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mk_rapport_2010_en.pdf; SEC(2011) 1203 final, p. 37-38 http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/mk_rapport_2011_en.pdf;

and 2012 state, however, that the alignment of the law with EU *Acquis* remains to be confirmed. Thorough gap analysis remains to be conducted, especially having in mind the recent development in the EU legislation in the field.

b) Governmental aspects

The LCR has a set of very specific rules regarding the conditions of the establishment of the CMOs and their function i.e. licensing their operations. The licence is granted, as provided in the Law, upon request of the CMO which is expected to deliver to the Ministry of Culture, as the deciding body, a set of documents including registration documents from the Central Registry, Statute or other founding act of the organisation and other documents[87]. Further the LCR defines the elements that the Statute, i.e. the founding act must contain[88].

The procedure for licensing is led by the Ministry of Culture in rather short deadlines i.e. the Ministry has 60 days to decide if the request is to be approved or rejected. In cases of

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SWD(2012) 332 final, p.32-33
http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mk_rapport_2012_en.pdf ;
SWD(2013) 413 final, p. 25-27
http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/mk_rapport_2013.pdf

[87] These include: 1) Expected and probable number of right-holders and the scope of rights that shall be managed by the organization for collective management, the number of right-holders who have joined the organization and the scope of their rights; 2) Assessment of the financial justification for efficient and economic collective management of determined rights ; and 3) Evidence that the organization meets certain premises, staff and other conditions (appropriate business premises, equipment for collection and processing of collective management data, and staff qualified in the field of collective management with at least one employee with a degree and one with a degree in economics for the accounting duties, through its own administrative service or by assigning the operation to a third party).

[88] Article 147, Contents of the Statute or the Founding Act of the Organization : In addition to the elements provided by other Law, the Statute or the Founding Act shall contain provisions concerning the duties of the organization as provided by this Law, in particular: 1. Types and scope of the rights that are managed; 2. Bodies of the organization, their competences, accountability, responsibility, manner of operation, election and discharge; 3. Conditions and manner of obtaining a member status in the organization; 4. Manner and participation of the members in the bodies of the organization and their rights, duties and responsibilities; 5. Procedure for exemption (prohibition) from collective copyright management by a right holder, except when the right holder may not waive that right, in accordance with this Law; 6. Procedure for protection of members' rights; 7. Procedure for adoption of general acts; 8. Manner of collection of remunerations and principles of their distribution; 9. Establishing procedure and principles for concluding agreements with relevant organizations abroad and manner of exchange information on collective management; 10. Manner and conditions for internal control and supervision over the work; 11. Manner and conditions for transparency in the operation, to the members, to the users and to the wide public; 12. Conditions for termination of the organization and division of the property.

rejection the party has the right to initiate administrative dispute. Two such administrative disputes have been initiated and completed in favour of the CMOs so far. The data from the files[89] shows that the Ministry goes, as assessed by the Court, even beyond what it is supposed to asses. In one of the cases, for example, it found that the founding members of the CMOs are, in the opinion of the Ministry, not performing artists but composers while the CMOs is registered for the collective management of the music performing artists' rights, and this, according to the Ministry, was a reason for not approving the Statute, thus rejecting the application[90].

One can identify novelties introduced by the amendments of the Law as a mechanism of control of the functioning of the CMOs: - possibility for withdrawal of the licence if the tariffs are not approved; and - high sanctions if the collecting society does not provide an annual report of its activities to the Government. The Government may, through the Ministry of Culture, control the work of the CMOs by inspections as Art. 153(2) provides that this Ministry has the jurisdiction to supervise the acts and the work of the organisations. There is no publically available data on the number of such inspection controls carried out in the past or their results, neither were those provided upon a request to the Ministry of Culture. The first mechanism shows that the Government has high control over the Tariffs and the level of the remuneration. The Government adopted such an approach, and the Assembly obviously agreed to it, finding that the Tariffs are to be of mutual interest of the rights-holders, the users and the wider community. It is found that the procedure for the enactment of the Tariff as described above will provide for the protection of the interest of the right-holders and the users, as the participation of the Government in the process is seen as means to provide objectivity in the establishment of authors' remuneration, having in mind the value of the authors' work, and the economic parameters and indicators in the country as well.[91]

The Government performs the ultimate supervision of the work of the CMOs as their annual financial report is to be submitted to the Government. Failure to do so shall result in fines of 10,000 to 15,000 EUR (Art. 154(1) point 2) in relation to 185(1) point 2)). It is explained that this will provide for better insight of the Government into the proper functioning of the organisations.

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[89] One of the CS has published the decision of the Administrative Court which provides insight into the case, the reasoning of the Ministry of Culture in review of the application as well as the reasoning of the Court regarding the decision.

[90] This decision was repealed by the Administrative Court

[91] As provided in the Explanation and Justification of the Draft-Law for Amendments of the LCR; see note 4 to this text.

Licence shall be revoked if the Ministry of Culture in its supervision activities finds inconsistencies in the work of the CMO, and the CMO do not rectify them in a given period of time.

The amendments of the LCR go even further and introduce additional mechanisms of control. Namely, the CMOs are obliged each year to provide an independent audit report for their financial status and the regularity of its work in accordance with the LCR and the general acts of the organisation. The LCR specifies the obligation of the CMOs to provide to the Ministry of Culture, in the performance of its duty for control the complete financial, accounting and any other documentation (Art. 156-a). Further, the Law increases the amount of data that is to be provided by the CMOs to the public in the efforts to contribute to their transparency.

In the overall set of Government bodies one should not forget the Commission of Mediation, which has the main role in the assessment of the tariffs. The Commission also has jurisdiction to mediate in the conclusion of agreements for cable retransmission. Such mediation is upon request by any party to the agreement, and if both parties request so, it may mediate in the conclusion of agreements for other types of use of copyright works or subject-matter of related rights. In these cases the Commission assists the parties in the conclusion of the agreement and may submit proposals to the parties. These proposals, by virtue of Article 141(3) shall be considered accepted if none of the parties to the agreement expresses its opposition to the proposals within three months from their receipt. The Commission, as provided in Article 142, is appointed by the Government, upon proposal of the Ministry of Culture and it consists of a President and four members for a mandate of four years. The President and the members of the Commission for Mediation shall be appointed from among the renowned independent and objective experts in the field of copyright and related rights, economy, and protection of competition and communication services. The new composition of the Commission meets, at least formally, these requirements.

c) Collective management organizations

The potentials of the system of collective copyright management seem to have been assessed by the authors and performers rather late, i.e. in the mid-2000s, when the existing authors' and/or producers' and/or performers' organisations' (NGOs) started to transform into CSOs. This was the result, in a way, of the newly-found confidence and the wish to make a difference, particularly in the music industry. The development, unfortunately, was confined to the music industry only. Thus, the oldest one – the Association for the Protection of Authors' Music Rights (ZAMP)[92] is authorised to undertake collective management in regard to 1) reproduction and rental of non-stage music works on phonograms and videograms; 2) communication to the public of non-stage music works

[92] http://www.zamp.com.mk/

(public performance; public transmission; broadcasting; rebroadcasting and making available to the public.); 3) cable rebroadcasting of non-stage music works and 4) right of royalty from resale or original (manuscript) of musical work. The organization was an associate member of CISAC since 1993 and full membership was assumed in 2005. It has a number of contracts for reciprocal representation with foreign CMOs.

One of the new organisations – the Macedonian Music Industry[93] (the procedure following administrative dispute ended by award of licence) has the right for collective management of the rights of the phonogram producers and the rights of the music performers. It claims membership of IFPI, SCAPR and AEPO-ARTIS.

The third one, the Association for Collective Management of Related Rights of Music Performers and Producers of Macedonia (KOMIP)[94], in the process of obtaining a licence following a long administrative dispute, is also an organisation of performers and producers.

Except for the oldest organisation, the others faced problems in their establishment in terms of obtaining licences for their work. The biggest problems that they have faced so far are the internal disputes about the distribution of the remuneration and the differences in the treatment of authors vis-à-vis performers.

In the system in total, it is yet to be seen how authors/holders of related rights in other fields will organise and manage their rights. The level of their awareness of the opportunities for collective management is very low or, if observed through the fact that there are no CMOs in this field, it does not exist. In these terms the full effect of the system as set by the LCR cannot be assessed – in the Republic of Macedonia the only association for collective management of rights is the management of the ones related to the music industry.

As for the presence of foreign organisations, CELAS states at their web-site that it covers the territory of the Republic of Macedonia[95]. The request for further explanation as to how they do so was not provided by CELAS by the time of the completion of this report. We have contacted ZAMP for information on reciprocal representation or some other form of agreement within CELAS; however, no information was provided by them either.

d) Competition issues

In the process of the establishment of the system of CMOs (put in plural), ZAMP has long been the only one that provided such services. Even today it tops in numbers the rights-holders that it represents compared to the other organisation(s). From a legal perspective,

[93] http://mmi.mk/
[94] http://www.komip.mk/default-mk.asp
[95] http://www.celas.eu/CelasTabs/Territories.aspx

however, there is no monopoly of a single organisation for one type of rights. Although, in principle, for the same type/use of rights, a license shall be issued to one organization, the LCR (Art. 149(3)) foresees that in the cases when more than one licence is issued, the organisations are obliged to regulate their relations in strict deadlines. This means that a monopoly cannot be established.

e) Other issues

Although the Ministry of Culture plays an important role in the system of collective management in the control and the oversight of the CMOs, the question arises as to how it will manage to perform this task having in mind that the sector of copyright and related rights has, by the available numbers, in total 4 employees. Information on their educational background is not available.

Montenegro

Contributor: Dr. Draginja Vuksanović

a) Legislative framework

Intellectual property rights are protected in Montenegro by the instruments of administrative law, civil law, criminal law protection and laws regulating misdemeanors. Institutions competent for the enforcement of intellectual property rights are: Intellectual Property Rights Office, Ministry of Economy, Police Directorate, Customs Administration, Phytosanitary Administration, Inspection Directorate, judicial organs and Prosecutor's office of Montenegro. The legislative framework for the enforcement of intellectual property rights in special laws, which regulate intellectual property, has been established in Montenegro as well.

Montenegro has started negotiations on accession to European Union. The government of Montenegro passed the decision on September 20, 2012, on establishing a Working Group for preparation of negotiations for accession of Montenegro to the European Union for the area of Acquis communautaire of the European Union, which relates to 7th negotiating chapter – Intellectual property rights. The Government of Montenegro has appointed the director of the Intellectual Property Rights Office to be the Chief of the Working Group. The Intellectual Property Rights Office is the main subject of negotiating obligations for Chapter 7 – Intellectual property rights. The working group is composed of organs which are competent for the enforcement of intellectual property rights, as well as of representatives of the non-government sector.

Acquis communautaire of the European Union for chapter 7 – Intellectual property rights treats the issue of copyright and related rights, of industrial property rights and the provisions on their enforcement. Analytical review for intellectual property was held in Brussels (Explanatory analytic review on 10th and 11th October 2012 and Bilateral analytic review on 20th and 21st November 2012). Representatives of the General Directorate for internal market and services (DG Internal Market), within the framework of mission of European commission on establishing of factual condition in the area of intellectual property, have stayed in Montenegro. European commission has delivered a screening report for Chapter 7 – Intellectual property rights, in which Montenegro has been positively assessed and for this chapter there were no additional standards that should have been met. Hence, the opening of this negotiating chapter has been proposed. The government of Montenegro has adopted the text of the negotiating position of Montenegro.

Collective management of copyright and related rights has been regulated in Montenegro by the Law on copyright and related rights of Montenegro („Official Gazette of Montenegro", Nr. 37/11) (*hereinafter referred to as the: Law*). By this Law the following questions have been regulated: issues of activities and conditions for issuance of the license

for performing of activity of collective achievement of rights; question of issuance and revocation of the license by the administrative body competent for issues of intellectual property – Intellectual Property Office; relations of the organization and the members; question of internal structure of the organization; manner of performing distribution of income; manner of establishing tariffs and the role of the state in that procedure, as well as questions of control of the activities of the organization.

Montenegrin legislature regulates the issues of internal organization and functioning of the organization for collective management of rights to a sufficient degree and provides all preconditions for establishing of an efficient system of collective management of rights.

Montenegro has, on the occasion of drafting of the Law, taken care of all actual issues, which relate to new trends in collective management of copyright and related rights at the level of European Union. Montenegro has, in relation to issues of functioning of the organization for collective management of rights, taken into consideration the most significant provisions of the proposal of the directive which regulates collective management of copyright and related rights and multi-territorial licensing in the internal market, as well as of the decisions of the organs of the European Union (European commission, European Court of Justice and European Parliament).

b) Governmental aspects

Provisions of articles 148, 149, 150, 151, 152 and 153 of the Law regulate procedure for obtaining a license for performing of activity of collective management of rights. License for performing of activity according to valid regulations in Montenegro can be issued to only one organization for one type of protected subject matter. In provisions of articles 148 and 149 of the Law the formal conditions which have to be fulfilled by the organization in order to obtain the license for performing activities of collective management of rights have been established. The procedure for obtaining the license from the Intellectual Property Office is instituted by submitting a written request. Along with the request a number of by law-established acts (e.g. founding act, statute and preliminary contracts on representing of members) need to be submitted, by which the fulfillment of conditions for performing of this activity is proven. Beside these formal conditions, the Law sets a few more. First of all the collective management of copyright and related rights may be performed by a legal person, whose statute fulfills certain conditions established in the Law; which has been registered into the register of non-governmental organizations with the competent organ; which has concluded preliminary contracts on representing the majority of domestic holders of rights for objects of protection to which the activity is concerned; has at least one employee with higher professional education of legal profession; disposes with business premises; is equipped with necessary communication equipment and has drafted the rules on transparent, complete, timely and regular manner of work. Therefore, it is expected from the side of organization to fulfill a series of conditions of formal character by which it proves that it will

perform its activity in a transparent, effective and efficient manner. Beside formal conditions established in the Law, the Intellectual Property Office, on the occasion of establishing the fulfillment of material conditions for performing activities of collective management of rights, also investigates other conditions, for example, the relations of the organization with foreign right-holders, the manner of establishing cooperation with foreign, related organizations and similar. Hence, the Intellectual Property Office takes care of all essential aspects of management of rights in the process of issuing a license in an efficient and transparent manner. So far in practice the licenses have not been issued to other organizations which have submitted the request, and at the same time they have not, in whole, fulfilled all formal and material conditions for performing of this complex activity.

The Intellectual Property Office, by applying regulations by which the collective management of copyright and related rights is regulated, as well as general regulations, which regulate administrative procedure, carries out supervision over legality and suitability of work of the organizations for collective management of rights. In practice, the Intellectual Property Office of Montenegro carries out supervision over the work of the organization for collective management of copyright, which implies inspection supervision and administrative supervision. The organization must deliver to the Intellectual Property Office all its financial reports, general acts, decisions of internal organs, agreements with foreign organizations, reports on distribution, agreements with users, tariffs and other reports from article 178 of the Law within a determined, very short deadline. Beside these obligations, the Office has, in the procedure of supervision, issued the order to the only organization which has the license for performing activities of collective accomplishment of rights in Montenegro that it can publish one part of its reports and acts on its Internet page. So far in practice of collective management in Montenegro there has been no procedure conducted for revocation of the license for performing of this activity.

In accordance with provisions of articles 171, 172, 173 and 174 of the Law, the organizations shall conduct negotiations on tariff of allowances with representative associations of users. If the agreement is not reached, one of the parties in negotiations may institute procedure for establishing a temporary tariff. The temporary tariff is issued by the Intellectual Property Office, taking into account the requests of all parties at the same time. In case that one of the parties considers that the temporary tariff is not in accordance with the Law, or that it is not appropriate, it may institute a dispute before competent court.

The Intellectual Property Office of Montenegro has got enough qualified and highly educated cadre in the area of protection of intellectual property rights, which includes also expert persons for performing expert and administrative affairs in connection with collective management of rights.

c) Collective management organizations

In Montenegro, only the organization for collective management of rights of the authors of music has got the license for performing of activity of collective management of copyrights and related rights. This organization has obtained the license for performing the activity of collective management of right from the Intellectual Property Office of Serbia and Montenegro. The license has been renewed by the decision of Intellectual Property Office of Montenegro. As it has already been mentioned, the license may be obtained only by the one organization for one sort of the subject of protection.

Problems that the organization for protection of rights of the authors of music in Montenegro is facing are related to collecting funds from the users for using the creations from its repertoire. Although the number of court proceedings, conducted on grounds of infringement of contractual obligations between the organization and users, is still high, it has been, to significant extent, reduced in comparison to earlier years. In one period a particular number of authors have expressed dissatisfaction with internal establishment of the organization. However, in proceedings of carrying out supervision and in a great number of court proceedings, it has not been established that it came to an infringement of essential obligations of the organization and rights of the members by the organization.

The only organization that exists in Montenegro, organization for protection of rights of the authors of music, has developed and is still developing cooperation with related organizations by signing reciprocal contracts. Organization for protection of rights of the authors of music has signed contract on cooperation with the majority of related organizations in the region. This organization is a full-fledged member of CISAC.

There is no existence of other collective organizations or international associations, which, on the territory of Montenegro carry out collective management of copyright and related rights, or offer licenses for cross-border management of rights.

d) Competition issues

In Montenegro, only the organization for protection of rights of the authors of music has got the license for performing the activity of collective management of rights. This organization enjoys *de facto* the monopoly on the territory of Montenegro. No other association or organization has appeared so far with request for issuance of the license for performing the activity for the same sort of rights or objects of protection. Proceedings with regard to establishing infringement of competition laws in relation to the organization for collective management of rights of the authors of music have not been conducted in Montenegro.

Serbia

Contributor: Dr. Dušan Popović

a) Legislative framework

In Serbia, collective management of copyright and related rights is regulated by the Copyright Act (Arts 152-201g).96 The Serbian system of collective management of rights demonstrated certain deficiencies, which were subject to several legislative interventions – first, the adoption of the 2009 Copyright Act, then the adoption of the 2012 Amendments to the Copyright Act, and finally the 2013 Draft Amendments to the Copyright Act.

Until the adoption of the 2009 Copyright Act, the collective management organizations were allowed to set the tariff independently, without having to consult the organizations of users of copyright protected works and subject matter of related rights. The Management Board of the collective management organization could set the tariff unilaterally, following the criteria laid down by the Copyright Act. The tariff would become mandatory following its publication in the Official Journal. This led to constant tension between right owners and users and there were even cases of organized boycott.97 Such unilateral determination of the tariff is no longer possible. Since the entry into force of the 2009 Copyright Act, the collective management organizations must engage in negotiations on the tariff with the representative organizations of users of copyright protected works and subject-matter of related rights. In case the parties to the negotiations fail to reach an agreement, a special body formed within the IP Office – the Commission for copyright and related rights, was empowered to set the tariff.

The negotiations conducted under the 2009 Act proved unsuccessful, so the tariffs needed to be set by the Commission for copyright and related rights. These tariffs were perceived as inadequate by the organizations of users of copyrighted works and subject-matter of related rights, which successfully exercised pressure on the Government and the Parliament aiming at modifying the rules on collective management of rights. This resulted in the 2012 Amendments to the Copyright Act. The Commission for copyright and related rights was abolished. Under the Amended Act, in case representatives of right holders and users fail to reach an agreement on the tariff, the proposal of tariff is adopted by the collective management organization. The proposal then has to be approved by the Intellectual Property Organization.

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[96] *Zakon o autorskom i srodnim pravima,* Official Journal of the Republic of Serbia nº 104/2009, 99/2011 and 119/2012.

[97] The organized protests of associations of users of copyright protected works and subject matter of related rights continued even following the entry into force of the 2009 Copyright Act. For example, the actions were performed on December 22, 2010, January 22, 2011 and February 22, 2011 throughout Serbia, when bars and restaurants stopped playing music for one hour.

The 2012 Amendments to the Copyright Act introduced significant modifications of the criteria for setting the tariff for the communication to the public of musical works, performances and phonograms, and in relation to the right to levy. These modifications were considered as a "step backwards in the alignment with the acquis" by the European Union.[98]

Firstly, the highest amount of the remuneration paid in accordance with the tariff for communication to the public of musical works, performances and phonograms cannot exceed 1/12 of the minimum wages in the Republic of Serbia, without taxes and contributions, for users having commercial business premises up to 50 square meters, or it cannot exceed 1/10 of the minimum wages in the Republic of Serbia, without taxes and contributions, for the users having commercial business premises of 50 to 100 square meters, or it cannot exceed 1/8 of the minimum wages in the Republic of Serbia, without taxes and contributions, for users having commercial business premises of 100 to 150 square meters, it cannot exceed 1/6 of the minimum wages in the Republic of Serbia, without taxes and contributions, for the users having commercial business premises of 150 to 200 square meters, and for the users having commercial business premises of 200 to 300 square meters it cannot exceed 1/3 of the minimum wages in the Republic of Serbia. For each additional 100 square meters, the remuneration is increased for the maximum amount of 1/10 of the minimum wages in the Republic of Serbia, without taxes and contributions. Furthermore, remuneration for the communication to the public of musical works, performances and phonograms in the craftsmanship shops is not paid at all.

Secondly, the remuneration paid per every sold or imported technical device that may be used for reproduction of copyrighted works and/or subject matter of related rights, and per every sold or imported text, sound or video carrier, in relation to the right to levy, cannot exceed 1% of the value of a device/carrier, except in case of sale of import of empty compact discs, empty digital video discs, empty digital video discs of high definition, empty blue ray discs, empty mini discs, empty audio cassettes and empty video cassettes, where the amount paid cannot exceed 3% of the value of such carrier.

In late 2013, the Intellectual Property Office drafted the Amendments to the Copyright Act, the adoption of which is now pending in the Parliament.[99] The proposed amendments partly focus on the system of collective management of rights. The rules laid down by the 2012 Amended Copyright Act, which were subject to criticism by the European Union, are to be abolished. Namely, the maximum amount of the remuneration paid in accordance with the tariff for communication to the public of musical works, performances and phonograms will no longer be prescribed by the law.

[98] European Commission, Serbia 2013 Progress Report, COM (2013) 700 final, p 26.
[99] Situation in January 2014.

The developments in the field of collective rights management on the EU level (e.g. CISAC case, Service Directive etc.) do not affect the current or the proposed legislative framework in Serbia.

b) Governmental aspect

The conditions for the establishment of collective management organizations, as well as rules governing their activities are prescribed by the Copyright Act. A collective management organization is a legal entity that has a status of an association, operating on the whole territory of the country.[100] A collective management organization may be founded by the authors and/or owners of copyright or related rights and/or their associations. A Memorandum of association represents the founding document of the collective management organization. The organization can perform only the activities related to the collective management of copyright and related rights, enumerated in the article 153 of the Copyright Act: (a) the holders of copyright and/or related rights shall license their rights exclusively to the organization, instructing it to conclude contracts on the non-exclusive licensing of such rights, in its own name and on their behalf, with the users of works; (b) the holders of copyright and/or related rights shall instruct the organization to collect the remuneration from the users, in its own name and on their behalf; (c) the organization will exercise control over the exploitation of the subject matters of protection on its repertoire; (d) the organization will protect the rights entrusted to it by the holders of copyright and/or related rights before courts and other authorities; (e) upon the request of the organization, any authority responsible for maintaining the record of data that are relevant for determining the amount of remuneration, shall make such data available to the organization. Apart from these activities, the collective management organization may perform activities realizing the artistic, professional or social interests of the right holders, and perform specific administrative and technical services in the name and for the account of another organization, on the basis of an agreement concluded in a written form.

The organizations which fulfill the criteria set by the Copyright Act are granted an operating license by the Intellectual Property Office. Each collective management organization needs to adopt certain general acts of the organization, prescribed by the Copyright Act. These are: the Statute, the Fee Schedule and the Distribution Plan. The Distribution Plan lays down criteria on the basis of which the organization distributes to holders of copyright and related rights the income collected from the users in the form of remuneration for the use of the subject matter of protection. The Copyright Act sets the main principles of such distribution: proportionality, appropriateness and fairness.

[100] Under the 2004 Copyright Act, collective management organizations had to be founded in the form of a company and registered within the Serbian Business Registers Agency.

So far, the IP Office issued licenses to the following four organizations: (1) SOKOJ - music authors' organization;[101] (2) OFPS - phonograms producers' organization;[102] (3) PI - organization for collective management of performers' rights;[103] and (4) OFA - organization for collective management of rights of authors of photographs.[104] Although the Copyright Act entrusts the IP Office to supervise the activities of collective management organizations and sanction them in case of breach of their duties, the Office rarely used its powers. In certain cases this may be justified by the restrictive approach of the legislator empowering the Office to intervene only in cases of extreme violations of the law. For example, the IP Office may revoke the license delivered to a CMO only in case of a repeated breach of the Copyright Act. It could also be noted that, up until 2013, the IP Office was focused on the process of harmonization of Serbian IP rules with international and EU sources of law, thus disregarding the area of collective management of copyright and related rights.

Under the 2013 Draft Amendments to the Copyright Act the IP Office will be empowered to revoke the license in all cases of serious breach of duties by the CMO, be they repeated or not. Furthermore, the Draft Amendments provide for a possibility to revoke the license not only in case of violation of the Copyright Act, but in case of violation of the Statute and other acts of the CMO as well.

The IP Office supervises the activities of CMOs ex officio. Third parties are not allowed to initiate the supervision. The CMOs are required to regularly report to the IP Office, submit all relevant documents (e.g. yearly business plans, modification of the Statute), provide written response to questions posed by the IP Office and follow the instructions given by the Office.

The IP Office is involved in the process of tariff negotiations. Namely, the proposal of tariff, negotiated by the parties, has to be confirmed by the IP Office.[105] The confirmation procedure is regulated by the Act on general administrative procedure.

Under the current legislative framework there are no dispute resolution bodies with regard to disputes between CMOs, right holders and users. It is advisable that such bodies are established. It should be noted however that, in the past, the representatives of CMOs and associations of users of copyrighted works and subject-matter of related rights did not show

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[101] The operating license was issued to SOKOJ in 1998, although the organization is active in Serbia (and previously in ex-Yugoslavia) for more than 60 years. For more information on SOKOJ, visit: <www.sokoj.rs>

[102] OFPS received its operating license in 2002. For more information on OFPS, visit: <www.ofps.org.rs>

[103] The operating license was issued to PI in 2007. For more information on PI, visit: <www.pravainterpretatora.org>

[104] The operating license was issued in 2013.

[105] See previous chapter.

willingness to compromise. For example, the activities of the Commission for copyright and related rights, established under the 2009 Copyright Act and abolished by the 2012 Amendments to the Copyright Act, were often blocked due to disputes between the two groups.

Although the Copyright Act lays down reasonably detailed rules on collective management of rights, Serbian legislative framework lacks certain specific rules, especially in the area of supervision of the IP Office over the activities of CMOs. Therefore, the current state of legislation could be characterized as "under-regulation". However, these shortcomings would be overcome once the proposed amendments to the Copyright Act are adopted.

c) Collective management organizations

Up until 2013, collective management organizations in Serbia were active only in the music sector (SOKOJ, OFPS, PI). The three CMOs cooperated successfully and even led several joint marketing campaigns aiming at raising awareness of the importance of efficient copyright protection system. The fourth CMO (OFA) received its operational license in 2013. It manages the rights of authors of photographs. The negotiations on the establishment of a CMO in the area of reprographic rights are ongoing.

SOKOJ (the music authors' organization) is the oldest CMO on the territory of the former Yugoslavia. It is member of CISAC and BIEM. SOKOJ concluded 101 mutual cooperation agreements with foreign CMOs. OFPS (the phonograms producers' organization) concluded 15 mutual cooperation agreements with foreign CMOs, while PI (the organization for collective management of performers' rights) concluded 16 such agreements.[106]

Unstable legal framework could be identified as one of the main obstacles for successful performance of the activities of CMOs in Serbia. Until 2009, negotiations on the tariff between CMOs and representative associations of users were not mandatory. Tariffs were set by the CMOs, which was perceived as unfair by the users. This resulted in estimated 5.000 court proceedings related to the fees payable under the tariff.[107] Since 2009, negotiations became mandatory and the Commission for copyright and related rights was empowered to set the tariff in case the parties fail to reach an agreement. However, the tariffs set by the Commission were also perceived as inappropriate by the associations of users, which led to several administrative disputes before the Administrative Court. The rules on

[106] Information published on the websites of these CMOs.

[107] Information communicated in the document explaining the reasons for passing the new Copyright Act (*Obrazlozenje Predloga zakona* in Serbian), published by the Government/Serbian Intellectual Property Office in 2009.

collective management of rights were modified once again in 2012, when the legislator prescribed maximum amounts of the remuneration paid in accordance with the tariff. The Copyright Act is supposed to be amended once again in 2014.

Further to the unstable legal environment, collective management organizations face certain internal challenges. A group of right holders regularly questions the legality of activities of existing CMOs, especially the manner in which the fees collected under the tariff are distributed. In certain cases, the IP Office intervened and requested that the distribution is organized in a more transparent way pro futuro. The 2013 Draft Amendments to the Copyright Act laid down more detailed rules on the distribution of fees collected under the tariff and empowered the IP Office to revoke the license in case of violation of a Distribution Plan.

d) Competition issues

Collective management organizations enjoy legal monopoly in Serbia.[108] Only one organization may be entrusted the collective administration with respect to the same category of right holders and a particular type of works. The collective management organization will be granted a license provided its founders represent the majority of right holders in respect of a certain category of rights and provided it fulfills organizational, technical and financial conditions to efficiently administer the rights of national and foreign right holders in Serbia and national right holders abroad.

The Competition Act entrusted the Serbian Competition Authority (Komisija za zaštitu konkurencije) with the power of sanctioning competition infringements in all sectors of economy. Therefore, the activities of collective management organizations are not a priori exempted. However, according to the available information[109], the Competition Authority so far initiated only one proceedings against a collective management organization. In 2009 the Authority initiated ex officio proceedings against OFPS (organization of phonogram producers) aiming at determining whether the tariff applied by OFPS represented an anti-competitive agreement. The tariff prescribed unequal conditions that OFPS would apply when concluding 3-years contracts with different cable RTV operators. According to the tariff, more favorable conditions would be offered to operators covering more than 40 % of the market. Immediately following the initiation of proceedings before the Competition Authority, OFPS modified its tariff. The Competition Authority suspended the proceedings,

[108] Copyright Act, Art. 157, para. 2 and Art. 158, para. 1, under 2).

[109] The Competition Authority publishes only the wording of its decisions in the Official Journal of the Republic of Serbia, which makes the website of the Authority the main source of information on competition enforcement. Unfortunately, only rare decisions of the Competition Authority are published online in integral version. In case a decision is not published on the website, the yearly report on the activities of the Competition Authority remains the only source of information on its activities.

provided that the collective management organization does not repeat the infringement of competition rules within six months following the adoption of the decision on suspension.[110]

e) Other

For years, IP-related issues were of peripheral interest to both "ordinary citizens" and politicians. However, this drastically changed in the last decade. All legislative interventions in the field of copyright law now attract interest of citizens and the media. Collective management organizations are perceived as "greedy" and usually referred to in negative connotation by the media. The increased interest of citizens and journalists in copyright law-related issues attracted the interest of politicians as well. The direct result of the increased interest of Serbian politicians in copyright law was the adoption of the 2012 Amendments to the Copyright Act, which introduced significant modifications of the criteria for setting the tariff for the communication to the public of musical works, performances and phonograms, and in relation to the right to levy. These amendments, subsequently criticized by the European Union, were drafted by the Ministry of Finance, without prior consultation of the IP Office. Compared to the situation in the 20th century, collective management organizations currently work in a rather hostile environment and experience difficulties in justifying their activities to average citizens.

[110] See the 2009 Report of the Serbian Competition Authority, p. 27, available at <www.kzk.gov.rs>.

Slovenia

Contributor: Dr. Martina Repas

a) Legislative framework

Collective management in the Republic of Slovenia is regulated by the Copyright and Related Rights Act[111] (hereinafter: CRRA). According to Article 146 CRRA CMOs are non-profit legal entities that perform the following tasks under their name and for author's account:

- allow the use of repertoire of protected works under the similar rules for similar uses;
- inform users of the amounts of proposed remunerations and conclude with them agreements concerning the conditions of the use protected works;
- publish the tariffs for the payment of remunerations;
- conclude agreements with foreign collecting societies;
- monitor the use of works of their repertoire;
- recover remunerations and authors' royalties;
- distribute collected means to right holders in accordance with adopted rules of distribution; and
- enforce the protection of authors' rights before courts and other State bodies, provided that they render account to the author for the rights so enforced.

Collective management in the Republic of Slovenia can be voluntary and mandatory. Mandatory collective management is prescribed in the following cases (Article 147 CRRA):

- communication to the public of non-theatrical musical works and literary works (small rights);
- resale of originals of works of fine arts (resale right);
- reproduction of works for private or other internal use and its photocopying beyond the scope of Article 50;
- cable retransmission of works, except in respect of broadcasters' own transmissions, irrespective of whether the rights concerned are their own or have been assigned to them by other right holders.

Under current legislation there is no possibility for authors to revoke the collective management of rights which require mandatory collective management or to prohibit collective management by the CMO. The lack of such possibility poses special problems to

[111] OJ RS, Nr. 16/2007 from 23. 2. 2007 (ZASP-UPB3), Nr. 68/2008 from 8. 7. 2008 (ZASP-E) and Nr. 110/2013 from 27. 12. 2013.

authors who don't want their rights to be managed by the CMO (i.e. especially unknown authors who wish to give their copyrighted works into use free of charge).

It has to be stressed that there are numerous problems with the existing national legislation regarding the collective management. CMOs, users and authors are facing several difficulties due to insufficient legislation (under-regulation) and lack of efficient enforcement by the competent authorities. Typical problems are: insufficient regulation of tariffs; gaps in the regulation of the Copyright Board that regulates tariffs in case of dispute between CMO and representative association of users (hereinafter: RAU); uncertainties about the competent authority in case of infringement of users' obligation to provide information on the public performance of protected works; for several years there is no CRO in the field of right to equitable remuneration for making a sound or visual fixation, and for photocopying of work in the field of private and other internal use, although mandatory collective management in prescribed for such rights; provisions regarding the establishment of CMOs are also insufficient and ambiguous and pose considerable problems in practice.

EU development in the field of collective management has not affected the national legislation so far although there were several unsuccessful attempts to amend CRRA in 2012[112] and 2013[113] including the abolition of monopoly position of CMOs in 2012. Though, it has to be stressed that the Slovenian Government took the position to support the uniform regulation of collective management of copyright in the EU on the 13th of December 2013 according to the Proposal for a directive on collective management.

b) Governmental aspects

The government body that controls the establishment of CMO in the Republic of Slovenia is the Slovenian Intellectual Property Office (hereinafter: SIPO). Authorisation for collective management of copyright is granted upon written request of a legal entity accompanied by the following documents (Article 148 of CRRA): a statute which defines bodies and authority for the execution of tasks of a collecting society; indication of persons who are entitled to represent the collecting society; indication of the number of persons who entrusted the collecting society with the management of authors' rights in their works gathered into a repertoire; the evaluation of economic importance of those rights for the efficiency of management.

SIPO refuses to grant authorisation if the statute of the collecting society does not comply with the provisions of CRRA; if the material basis of the collecting society does not ensure the forecast efficiency of management of authors' rights; if an authorisation has already been granted for the same category of authors' works to another collecting society,

[112] The Proposal for CRRA from 8. 1. 2012.
[113] The Proposal for CRRA from 10. 4. 2013.

unless the legal entity demonstrates that it could provide more efficient and more economical management of authors' rights, and that it could, based on contracts with the authors, manage a more comprehensive repertoire of protected works than the existing collecting society (Article 149(1) of CRRA).[114] According to Article 149(2) of CRRA the number of authors who have authorised the collecting society to manage their rights, the total number of their works, the extent of the exploitation of works or the volume of potential users of such works, means and ways through which the collecting society proposes to carry out its activity, its capability to manage the rights of foreign right holders, estimate of the anticipated amount of collected remunerations, and the costs of operation of the collecting society are particularly important when assessing the material basis of the collecting societies.

It can be seen in practice that the procedure to grant authorisation is not just a *pro forma* examination. On the contrary, it is a thorough examination and there were several cases of refusing to grant authorisation by the SIPO (just recently SIPO refused to grant authorisation to a collecting society regarding the management of the right to equitable remuneration for making a sound or visual fixation, and for photocopying of work in the field of private and other internal use though there is no CMO in this field for several years).

There are problems with the establishment of CMO especially in regards to the conditions to grant authorisation. The main reasons are:

- Ambiguous and insufficient provisions on formal and material conditions to grant the authorisation which pose difficulties regarding the procedure itself (collecting societies file inadequate applications which leads to lengthy procedures).
- Ambiguous and insufficient provisions are objects of different interpretation as a result of which administrative disputes before the competent court are growing.
- There were also some disputes and uncertainties about the proper form of legal entity for CMO.

A permanent governmental supervision by SIPO over the activities of CMOs exists in practice in the Republic of Slovenia, although there are some difficulties/obstacles which render effective supervision impossible; as seen in the Proposal to amend CRRA.[115] Under Article 162(2) of CRRA, SIPO can demand from a collecting society reports on business matters and inspection into their books and other business papers to the extent necessary, following a reasoned and detailed written request to examine the issue specified in the request. In this regard, SIPO should have detailed information about assumed irregularities

[114] The earlier authorization shall terminate with the issuance of authorization to the new collecting society.

[115] See the Proposal for CRRA from 2013, p. 7 and 8.

before making a request to demand a report on a concrete business matter or inspection into a business book. Under current legislation this is not possible to realize in practice. Besides, such requests can be seen as not reasoned or detailed enough. Consequently, a CMO can reject supervision on such basis.

Current legislation does not allow any third parties to initiate the governmental supervision. It has to be mentioned that each member of the CMO may demand to receive the annual financial report and the report of the supervisory board for inspection. Besides, at least one tenth of the full members of a CMO may demand that independent experts inspect the operation of the CMO (Article 160 of CRRA). It has to be mentioned that it is not entirely clear what is meant by referring to full members of a CMO. This term is not defined in the CRRA and its definition is left to the CMOs' internal rules, which leads to disputes among CMO members.

There were cases in practice where SIPO ordered the CMO to correct observed infringements of the CRRA regarding collective management. But, to our knowledge there is no case so far in Slovenia where SIPO would withdraw authorisation to any CMO.

Tariffs pose a huge problem in the collective management in the Republic of Slovenia due to several amendments and changes of legislation, legal gaps and ambiguous provisions.

According to Article 156(2) of CRRA tariffs are fixed upon an agreement between CMO and RAU. If this is not possible, it is fixed by the Copyright Board that is a quasi-arbitration tribunal (for its intervention no consensus of both parties is required). Exceptionally there is also a possibility for the CMO to fix unilateral provisional tariff when, for a certain use of authors' work, the tariff has not been fixed yet (Article 156(4) of CRRA). The supervision of tariffs is performed by the Copyright Board, which is not a governmental body. Against a decision of the Copyright Board an action can be filed before the Supreme Court of the Republic of Slovenia.

Problems in practice considering the tariffs are the following:

- In the year 2004 the amended CRRA[116] provided a special regulation of tariffs that were enacted unilaterally by the internal rules of the CMOs until 11.5.2004. These tariffs are now considered by legal fiction as tariffs fixed upon an agreement between CMO and RAU meaning that they can be changed only upon new agreement between CMO and RAU. These tariffs contained a valorisation clause in the common part of the internal rules and not in the tariff part. Some CMOs change the tariff unilaterally according to the valorisation clause which posed several conflicts with users. Consequently,

[116] See the amendments of CRRA-B (OJ RS, Nr. 43/2004 from 26. 4. 2004).

there are several disputes before the competent courts concerning the question, if such tariff agreement fixed by legal fiction contains valorisation clause or not. This question poses huge difficulties in cases where circumstances change to such an extent that those tariffs became unrealistic, especially where there is no RAU to negotiate to change the tariff. In practice there are conflicting courts' decisions on this issue. Although, it has to be stressed that in 2011 the Supreme Court of the Republic of Slovenia gave judgement on this issue. According to the Supreme Court, the valorisation clause is not part of the tariff and thus not part of the agreement established upon a legal fiction.[117] Some believe that the judgement of the Supreme Court failed to follow the decision issued by the Constitutional Court of the Republic of Slovenia[118] on this issue.

- Ambiguous provisions regarding the procedure before the Copyright Board (users that are not part of RAU cannot oppose the provisional tariff), its nature (at first there were some uncertainties, whether it is a permanent or an *ad-hoc* body[119]) and its composition (according to Article 157.f (3) of CRRA two members of the Copyright Board are appointed by the CMO which poses a special problem because the interests of the CMOs are so diverse that a consensus between CMOs is hard to reach). It also has to be stressed that members of the Copyright Board should have sufficient knowledge in the field of copyright law. The problem is the lack of provision in CRRA considering proofs of such knowledge. Besides, there is no provision in the CRRA regarding the term of office of the Copyright Board's members.
- The Copyright Board delivered only two decisions so far, although it was established by the CRRA in 2006. The reasons are mistrust, because members of the Copyright Boards are also users or representatives of users (lawyers) or members or employees or lawyers of the CMOs, and the ambiguous provisions about the procedure expenditure because the duration of the procedure and the amount of reward for the members are not limited.
- There is also a problem with insufficient definition of RAU. RAU are those associations of users which represent the majority of users in a certain field of activity with regard to their number, or those recognized as representative by some other act (Article 157 of CRRA). Thus, the fundamental criterion to define RAU is the majority of users, which poses difficulties in practice and prevent successful conclusion of the agreement.

[117] Judgement II Ips 160/2011 form 15. 9 . 2011.
[118] Order USRS U-I-149/98 from 28. 6. 2001.
[119] In practice the Copyright Board is permanent body.

CRRA provides no special dispute resolution (government) body with regards to disputes between all the stake-holders (right holders, CMO and users) in the field of collective management. Disputes are solved before the competent courts. As an alternative dispute resolution method there is only mediation, prescribed by Article 163 of CRRA, which refers to disputes between the CMO and RAU concerning the conclusion of an inclusive agreement for cable retransmission of broadcast only. There is also the Copyright Board, as previously mentioned, concerning some disputes about tariffs. To our knowledge there were no suggestions in practice aiming at the establishment of such a special governmental dispute resolution body.

As for the existence of sufficient level of expertise within SIPO, there are opinions that the level of expertise should be improved.

c) Collective management organisations

There are several CMOs which perform the activities of collective management in the Republic of Slovenia. According to CRRA (legal monopoly of CMOs) there is only one CMO in each field. These are:

- SAZAS for collective management of copyright in the field of music;
- ZAMP for collective management of copyright on works in the field of literature, art, science, journalism and their translations;
- IPF for collective management of performers and producers of phonograms on phonograms;
- SAZOR for collective management of authors' rights and works of publishers in the field of literature, science, journalism and their translations in case of reproduction and distribution of copyrighted works to the benefit of disabled persons and reproduction of copyrighted works for private and other internal use and photocopying beyond the scope of Article 50 of CRRA.
- AIPA for collective management of rights for co-authors on AV-works, performers, and film producers.

The main problem in the field of collective management of copyright is that for several years there is no collective society in the field of right to equitable remuneration for making a sound or visual fixation, and for the photocopying of work in the field of private and other internal use, although mandatory collective management in prescribed for such rights. Consequently, this remuneration has not been enforced since 2009 which is obviously detrimental to authors. Recently, SIPO rejected to grant authorisation to the ZAPIS association. There is also no CMO for the resale right due to the fact that even after more than a decade artists did not organise into a collective society to enforce their rights. It can also be seen in practice that come CMOs don't send invoices to users on a regular basis and

then after several years claim remuneration and file actions before the courts against such users even in cases of statute-barred claims. Such conducts are obviously detrimental to authors and indicate an insufficient collective management of rights.

As regards the collaboration between national CMOs, there is no special provision in CRRA. The only provision in the CRRA which somehow refers to this topic is Article 146(2). According to this provision a collective society may entrust the administrative work regarding the collective management of rights to another collecting society or to cooperation. Since collaboration between CMOs can be of a great benefit to authors and users, there is a tendency in the Republic of Slovenia towards such collaboration especially as regards joint accounts (invoices) to users.[120] Apart from that, there were some forms of collaboration between CMOs in the past, although not specially provided by CRRA, in the field of collective management for private reproduction and for cable retransmission in time when only temporary authorisations for collective management were granted to AAS (Copyright Agency of Slovenia) and SAZAS.[121]

The biggest problems CMOs face in the Republic of Slovenia are the following:

- There are several disputes before the competent courts between CMOs and users regarding the payments, mainly due to pure awareness of copyright and due to tariffs that refer to a legal fiction mentioned before.
- There are also internal conflicts between known and unknown authors since the latter don't receive any or only small remunerations.
- There are also many disputes between CMOs and the SIPO considering various issues in the field of collective management (refusal to grant authorisation, tort claims against SIPO due to damage to reputation of CMO, action for damages against SIPO regarding the temporary authorisation etc.). Such disputes and conflicts between CMOs and SIPO surely don't contribute to the effective performance of CMOs' tasks.
- Insufficient intervention of Market Inspectorate in cases of infringement.
- There are of course some legislative obstacles, a few of them were already mentioned above. At this point we have to mention Article 159 of CRRA. According to this article, organisers of public entertainments, and other users of protected works, shall acquire the rights of public communication prior to such use, and shall submit to the collecting society the list of all works used within 15 days after the use. On the request of the author or CMO the competent authority for internal affairs may prohibit public performance or other use of a protected work in case the organiser failed to previously acquire

[120] See the Proposal for CRRA from 2013, p. 5.

[121] See Trampuž Miha, Kolektivno upravljanje avtorske in sorodnih pravic (Ureditev v Sloveniji in Evropski skupnosti), GV Založba, Ljubljana 2007, str. 45.

those rights. Since Article 159 of CRRA proscribed competent authority for internal affairs as authority competent to deal with this issue, there is a problem because it is not clear which authority is in fact competent. In practice there is a conflict of jurisdiction between the police and the administration unit. Since this is a negative dispute on jurisdiction there is no opportunity to prohibit such public entertainment in time.

National CMOs developed good collaboration with foreign CMOs in corresponding fields. There are several agreements concluded between them. Besides, ZAMP and SAZAS are CISAC members, meanwhile AIPA and IPF are members of the AEPO-ARTIS. IPF is also a member of SCAPR and SAZAS in a member of BIEM etc. There is no other rights management bodies (e. g. CELAS) in the Republic of Slovenia.

d) Competition issues

According to Article 149(1)(3) of the CRRA CMOs in Slovenia have a legal monopoly position. So far only one CMO was the subject of examination by the Slovenian Competition Authority because of abuse of the dominant position under Article 9 of the Slovenian Competition Act and Article 102 TFEU. The CMO was allegedly accused of dominant position for charging the remuneration for the use of copyrighted works in a non-transparent way and for distributing the remuneration to the authors in non-transparent and discriminatory ways. The Slovenian Competition Authority gave its partial decision regarding the distribution of remuneration to the authors and found the abuse of dominant position by the CMO (Decision Nr. 306-39/2009-108 from 8.4.2011). The decision also imposed on the CMO the obligation to take measures to bring the infringement and its consequences to an end. Among others, these measures were: the CMO should ensure all authors have the same voting right regardless of the type of membership in the CMO; the CMO should publish all annual reports, decrees and summaries of minutes considering the accounts of royalties on its internet site; the CMO should publish notice on the enacting of general account and all its elements on its internet site; the CMO should model the criteria, which are conditions to obtain full membership on the ground of exceptionally achievements, objectively and transparently etc.

The case is now pending before the competent court.

Regional Phase II - Facing the Challenges / Summary of National Challenges in the Field of Collective Management of Copyright and Related Rights

Methodology

The following summary of challenges in the field of collective management of copyright and related rights is based on the provided country reports on challenges in this filed from Slovenia (M. Repas), Croatia (I. Gliha), Bosnia and Herzegovina (I. R. Mešević), Serbia (D. Popović), Montenegro (D. Vuksanović), Macedonia (J. Dabovik-Anastasovska/N. Zdraveva) and Albania (Z. Peto / O. Spiro); In this summary similar issues, obstacles and irregularities in the selected countries of the Region SEE were underlined and combined. This summary represents a basis for the Phase III (Dealing with the Challenges: Conventional Solutions & „Outside the box" solutions for challenges in the field of collective copyright management).

Abbreviations

CCM- collective copyright management (including also management of related rights)
CMOs- collective management organizations
IPR Office: governmental body of every respective country in charge of field of intellectual property, including CCM (with the exception of specific bodies such as the Albanian Copyright Office and Ministry of Culture of Macedonia)
Copyright Law: Law on Copyright and Related Rights every respective country (with the exception of Law on CCM of Bosnia and Herzegovina)

Challenge: Setting of tariffs

The setting of tariffs seems to be an overreaching challenge in the concerned countries of the Region. The answer to the question what is the appropriate, adequate and fair way to set the tariff (unilaterally by CMO, by negotiation with users, by involvement of an expert commission, or by a final approval of the governmental body) seems to be a variable category in these states. The most comprehensive legislative changes in the field of CCM in the concerned countries are targeting the issue of setting the tariffs.

In Serbia[122] e.g. until the adoption of the 2009 Copyright Law the CMOs were allowed to set the tariff independently, which led to constant tension between right owners and users and cases of organized boycott by the latter (consequence: estimated 5.000 court proceedings related to the fees payable under the tariff). After the entry into force of the 2009

[122] *D. Popović*, Serbia

Copyright Law, the CMOs needed to engage in negotiations on the tariff with the representative organizations of users. In case of failed negotiations, a special body (within the IPR Office) - the Commission for copyright and related rights, was empowered to set the tariff. However, in practice, also the tariffs set by the Commission were perceived as inadequate by the organizations of users (consequence: administrative disputes), which exercised pressure on the Government and the Parliament aiming at modifying the rules on CCM. The latter resulted in the 2012 amendments to the Copyright Law and the abolishment of the Commission. Under the amended Copyright Law, in case of failed agreement between users and the CMO, the proposal of tariff was adopted by the CMO and then approved by the IPR Office. The mentioned amendments also introduced significant modifications of the criteria for setting the tariff for the communication to the public of musical works, performances and phonograms, and in relation to the right to levy (defining the maximum amounts of remuneration to be paid), which were considered as a "step backwards in the alignment with the acquis" by the European Union. In 2014 amendments are expected that will once more target the issue of setting the tariffs.

New rules for the establishment of tariffs have also been introduced in Macedonia[123] in 2013. While the previous ones rested upon the will of the CMOs to ask for and to take into consideration the opinion of the users, the new ones necessitate such opinions to be obtained. Also, while the Commission for Mediation in the field of copyright and related rights previously served as an intermediary between the CMOs and the users, now its task is to evaluate the proposed tariffs and to recommend if they are to be accepted or rejected by the Government. In other words, the level of involvement of governmental bodies and Government itself in the tariff setting procedure is now much higher than before.

In Slovenia[124] the tariffs also pose a large problem in the CCM due to several amendments and changes of legislation, legal gaps and ambiguous provisions. According to the national Copyright Law, the tariffs are being fixed upon an agreement between CMO and representative associations of users (RAU) and, if this is not possible, by the Copyright Board (a quasi-arbitration tribunal). Exceptionally, there is also a possibility for the CMO to fix a unilateral provisional tariff. The supervision of tariffs is performed by the Copyright Board, which is not a governmental body and the legal framework regulating this body experiences gaps. The amendments of the Copyright Law from 2004 provided a special regulation of tariffs that were enacted unilaterally by the internal rules of the CMOs until 11.5.2004. These tariffs were then considered by legal fiction as tariffs fixed upon an agreement between CMO and RAU and could be changed only upon a new agreement between CMO and RAU. The latter contained a valorization clause in the common part of the internal rules and not in the tariff part. Some CMOs changed the tariff unilaterally according to the valorization clause, which posed several conflicts with users and led to

[123] *J. Dabovik-Anastasovska/N. Zdraveva*, Macedonia
[124] *M. Repas*, Slovenia

disputes before courts resulting conflicting courts' decisions on this issue. In 2011, the Supreme Court of the Republic of Slovenia gave judgment on this issue that the valorization clause is not part of the tariff and thus not part of the agreement established upon a legal fiction. In Bosnia and Herzegovina[125] the general agreements with the representative associations of users (RAU) do not play a very significant role in the practice of CCM, although they represent the principal method for setting of tariffs. The agreement concluded by the CMO with "an individual user" (individual agreement) as an instrument for setting the tariff (exception) is only mentioned in one Article of Law on CCM without any further regulation. Also the expectations that the Law on CCM would initiate the establishment of (new) RAUs were not fulfilled. Hence, the number of individual agreements (only mentioned/regulated in one provision of Law on CCM) exceeds the number of general agreements with RAU. Some of the associations of users that are party to general agreements cover users only from one entity of Bosnia and Herzegovina, which raises the question of their legitimacy to be considered RAU.

Challenge: permanent changes in the legislation regulating CCM

When a national system of CCM experiences difficulties in practice, the problem, as well as the solution to it, often lies in the respective legislation. Amendments are made in order to improve and support the practice of national CMOs and national IPR offices in hope to achieve an efficient and functioning system of CCM. Nevertheless, this is not always the case. More than sometimes permanent legislative changes destabilize the attempts to establish and introduce practical solutions within the existing "unideal" legislative framework and also raise doubts of users as well as right holders in the national CMOs. It is questionable whether "perfect legislation" in the field of is CCM necessary in order to achieve a sustainable and efficient national system of CCM, or is an "imperfect legislation" in the field of CCM an adequate excuse to ignore the current problems of CCM and potential practical solutions and wait for legislative reforms.

Some of the national contributors[126] explicitly identify the "unstable legal framework" as one of the main obstacles for successful performance of the activities of CMOs. In Serbia the rules on CCM were modified in 2009, 2012 and the national Copyright Law is ought to be amended again in 2014. One of the main subjects of legislative changes was the manner of setting the tariffs. Also in Slovenia[127] tariffs represent a large problem in the CCM due to, among other things, several amendments and changes in the legislation. The national contributor from Slovenia also pointed out that there were several unsuccessful attempts to amend the national Copyright Law in 2012 and 2013. Albania[128] is

[125] *I. R. Mešević*, Bosnia and Herzegovina
[126] *D. Popović*
[127] *M. Repas*
[128] *Z.Peto/O.Spiro*

also awaiting legislative changes, which are expected to review and improve the legal position of CMOs. In Macedonia[129] the changes to copyright legislation in 2013 had a strong impact on the regulation of CCM. In Bosnia and Herzegovina[130] on the other hand, the former legislative obstacles and ambiguities have been almost completely eliminated with the adoption of new legislation in 2010, however, the internal and external issues of CMOs have remained similar as before the legal reform.

Challenge: Underregulation, gaps, ambiguities and dicrepancies in the legislative framework for CCM

Although permanent legislative changes can have a destabilizing effect on the system of CCM, if the legislative framework experiences serious flaws, which cannot be eliminated by means of good practice of CMOs, amendments are unavoidable. Nevertheless, in connection with challenge no. 2 it seems to be necessary to improve the procedure of drafting of new Copyright/CCM laws, or their amendments in order to avoid early repeated legislative reforms in this field.

The contributor from Slovenia[131] clearly pointed to particular legislative obstacles and insufficiencies of the national Copyright Law (i.e. definition of representative association of users, provisions regarding the formal and material conditions of establishment of CMOs, different interpretations of other ambiguous and insufficient provisions, which results in administrative disputes etc.) and mentioned the attempts to conduct a legislative reform. The laws of Macedonia in 2013, Serbia (expected) during 2014, as well as Albania have been subject to extensive amendments. The question of their results needs time to be answered. In Bosnia and Herzegovina,[132] the special Law on CCM also suffers from some inconsistencies (e.g. abolishment of provisional tariff, individual contracts etc.); nevertheless, the legislative framework is more burdened by another issue. The special Law on CCM was passed in order to regulate this topic in a detailed and comprehensive manner and at the same time prevent the "over-cluttering" of the Copyright Law. Now, however, there is a rather excessive particularization of the legal sources on CCM in: Copyright law, special Law on CCM, two rulebooks of the IPR Office and one decision.

[129] *J. Dabovik-Anastasovska/N. Zdraveva*
[130] *I. R. Mešević*
[131] *M. Repas*
[132] *I. R. Mešević*

Challenge: "bad image" of CMOs, lack of public awareness and understanding of CMOs and CCM and the issue of legal tradition

Although there are differences with regard to the legal tradition of CCM and CMOs in particular countries of the Region, the problems with regard to the public perception of their functions and relevance seems to be comparable.

A particular challenge related to Albania[133] is associated with the fact that copyright is a rather new field of law in this country. Consequently, the awareness of individuals and users with regard to necessity to respect copyright has been and keeps being very low and produces negative consequences for the activity of CMOs. The latter reflects e.g. in the context of collection of remuneration from users, that CMOs do not yet have, in a way, full support from the state bodies, the users and authors/artists. Also, copyright protection structures have been established and become operational only over the last years (Albanian Copyright Office) and started awareness raising campaigns.

In other countries of the Region, CMOs and CCM have a rather long tradition. Despite that fact e.g. in Croatia[134], the biggest problem is the lack of public awareness about the CCM and negative publicity created by media appearances of users, who failed to settle their balances, or have lost law-suits for non-payment and attempt to create the wrong impression of inappropriately high remunerations. Also in Croatia, a large part of the public perceives CCM as an industry that exists for its own sake. In addition, a constant lobbying exists by the users' groups, who are trying to prove the unjustifiability of the CCM. They have also unsuccessfully requested that the government cancel or limit to the maximum the remuneration collected by the CMOs.

Similar to the above, in Serbia[135] the legislative interventions in the field of copyright law started to interest citizens and the media in the last decade. CMOs are perceived as "greedy" and referred to in a negative context by the media. In comparison to the situation in the 20th century, CMOs in Serbia are currently working in a rather hostile environment and average citizens are questioning the justification of their activities.

In Macedonia[136] it could be argued that the functioning of the system of CCM is brought into question also by the low level of awareness of the system itself by those within (the authors, users and to an extent the CMOs). Especially among the right holders the level of their awareness of the opportunities for CCM is very low. With regard to the public, there is a low perception of the CCM and the CMOs in particular in this country.

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[133] *Z.Peto/O.Spiro*
[134] *I. Gliha*
[135] *D. Popović*
[136] *J. Dabovik- Anastasovska/N. Zdraveva*

A comparable situation also exists in Bosnia and Herzegovina[137] where there is a public misconception of the activities and purpose of CMOs, which is being stimulated by the conflicts between former and current CMOs in the field of music and certain internal issues of CMOs.

Challenge: Politics and CCM

Hand in hand with the bad/wrong public perception of CCM and CMOs goes the recent interest/involvement of politics in this field. It seems that the area of CCM has in some countries become an instrument for attracting the votes of the electoral body.

In Croatia[138] e.g., the fact that the public is intrigued by the legitimacy of remunerations collected by CMOs also influences the politicians and at some point it seems that the political level also fails to understand the real meaning of the CCM.

In Serbia,[139] the increased interest of citizens and journalists in this field attracted the interest of politicians as well. The direct result of this increased interest of Serbian politicians was the adoption of the 2012 Amendments to the Copyright Act. The latter introduced significant modifications of the criteria for setting the tariff (maximum amounts) for certain rights and those were criticized by the European Union. Those amendments were drafted by the Ministry of Finance, without prior consultation with the IP Office.

Challenge: Boundaries of governmental involvement

As seen under Challenge no. 1, there seems to be a trend in the younger regulations governing CCM that the "final word" in the tariff setting process is given by a certain governmental body. The role of state when establishing and supervising the CMOs as entities with, usually, a monopolistic position in a certain field of CCM, entrusted with the performance of special social and cultural tasks is clear and justified. However, active involvement of the government when setting the amount of remuneration paid for the use of private rights represents another thing. The same issue applies when the legislation itself is posing the limiting parameter. The latter poses the question where the boundaries of state involvement in the field of CCM are.

In Albania[140] e.g., the CMOs are obliged to annually submit the tariffs for the use of works to the Albanian Copyright Office, within the first quarter of the subsequent year. However, these tariffs are not approved by this governmental body, but they have a floor and

[137] *I. R. Mešević*
[138] *I. Gliha*
[139] *D. Popović*
[140] *Z.Peto/O.Spiro*

a ceiling level defined by the Copyright Law. In Serbia[141] the IPR Office is involved in the process of tariff negotiations, since the proposal of tariff, negotiated by the parties, has to be confirmed by the IPR Office. In Macedonia[142] the Commission for Mediation in the field of copyright and related rights previously served as an intermediary between the CMOs and the users and since the amendments in 2013 it evaluates the proposed tariffs and recommends whether they are to be accepted or rejected by the Government. The Government has high control over the tariffs and the level of the remuneration and it adopted such an approach finding that the tariffs are to be of mutual interest to the rights-holders, the users and the wider community as well as a means to provide objectivity. Also in Macedonia, the acts of the CMOs are subject of approval by the Government.

Challenge: Effective and permanent state control/supervision over the activites of CMOs

Every considered country of the region in its respective law governing CCM also provides the provisions on control over the activities of CMOs. However, not only the clarity of the legislative solutions creating the basis for supervision and the included sanctions for CMOs represent a sufficient framework for an efficient control, but also the will as well as the capacity of the respective government bodies to conduct the necessary supervision activities. A well-balanced and permanent control over the activities of CMOs represents one of the key factors of a functioning CCM-system. The latter poses the question how to improve, or at all initiate an effective and permanent control over the activities of CMOs, but also, how this supervision is supposed to be arranged and shaped in order to achieve its goal.

In Bosnia and Herzegovina[143] e.g. the IPR Office did not conduct a continuous, but an ex post control over the activities of CMOs for the years 2005-2010. It justified this with the lack of relevant provisions in the former Copyright Law, although the Law on the Establishment of the IPR Institute explicitly provided for the authority of the IPR Institute to conduct supervision over CMOs, however, without including detailed provisions. Since the Law on CCM has been passed in 2010, there is a more "active approach" with regard to supervision over the CCM and CMOs in the country. The IPR Office started using its right to be present at the meetings of the assembly of the CMO through an authorized person and according to its statement it conducts ex officio supervision once a year. Nevertheless, there is no possibility to invoke the procedure of supervision of the IPR Institute by the right holders and lately there has been more than one attempt by the members of the national CMO to do so, yet the IPR Office remained silent. It seems that within this CMO internal conflicts exist and a number of members are complaining about the lack of transparency, democracy and efficiency in conducting business activities. They also state the inability to invoke their right

[141] *D. Popović*
[142] *J. Dabovik-Anastasovska/N. Zdraveva*
[143] *I. R. Mešević*

of supervision by the members. In Slovenia[144] there are some difficulties/obstacles, which make effective supervision impossible. IPR Office can demand from a CMO reports on business matters and inspection into their books and other business papers, following a reasoned and detailed written request. However, the IPR Office should have detailed information about assumed irregularities before making a request to demand a report on a concrete business matter or inspection into a business book and this is not possible to realize in practice under the current legislation. Besides, such requests can be seen as not reasoned or detailed enough and CMO can, as a consequence, reject supervision.

In Albania,[145] the legal provisions currently do not provide for a direct supervision regarding the activity of CMOs, thus leading to some negative consequences. The Statute of Albanian Copyright Office, as well as the Copyright Law, provide for some supervision authorities over the CMOs, but they are not exhaustive on the nature of control. In Serbia[146] on the other hand, although the Copyright Law entrusts the IPR Office to supervise the activities of CMOs and sanction them in case of breach of their duties, the IPR Office rarely uses its powers. In certain cases this may be justified by the restrictive approach of the legislator empowering the IPR Office to intervene only in cases of extreme violations of the law. However, the amendments of the Copyright Law due in 2014 are supposed to empower the IPR Office in this regard. Also the legislative reform from 2013 in Macedonia[147] introduced new instruments and mechanisms of control over the CMOs. It increased the amount of data that is to be provided by the CMOs to the public in the efforts to contribute to their transparency and introduced possibility for withdrawal of the license if the tariffs are not approved, as well as high sanctions if the CMO does not provide an annual report of its activities to the Government.

With regard to the data on the capacity of national IPR Offices to conduct supervision, the contributor from Albania[148] stated that the employees of the Albanian Copyright Office are aiming to improve the work of the people responsible for relations with CMOs through conferences and seminars. In Slovenia[149] there are opinions that the level of expertise should be improved in the IP Office. In Bosnia and Herzegovina[150] there are three employees in the Section for copyright and related rights of the IPR Office; however, the level of their expertise is not public. In Macedonia[151] the Ministry of Culture plays an important role in the system of CCM in the control over the CMOs. However the question that was raised was how it will manage to perform these tasks, having in mind that the sector

[144] *M. Repas*
[145] *Z.Peto/O.Spiro*
[146] *D. Popović*
[147] *J. Dabovik-Anastasovska/N. Zdraveva*
[148] *Z.Peto/O.Spiro*
[149] *M. Repas*
[150] *I. R. Mešević*
[151] *J. Dabovik-Anastasovska/N. Zdraveva*

of copyright and related rights, according to the available numbers, has 4 employees in total. Their educational background is not available.

Challenge: Number of CMOs covering different fields of CCM

In certain countries[152] of the Region there is quite a large number of CMOs covering different fields of CCM. In others however, there is currently either one operating CMO in the country (e.g. in Bosnia and Herzegovina and Montenegro in the field of authors rights in musical works),[153] or there are certain areas of CCM where it seems particularly challenging to establish a new CMO, such as the field of private copying levy (e. g. in Serbia, Slovenia and Bosnia and Herzegovina). Hence, for many years in different fields of CCM remunerations are not being collected and distributed to the right holders.

In Montenegro[154] e.g. so far no other legal entity has applied for a license and in Macedonia[155] only CMOs in the field of music are active. On the other hand, in Slovenia[156] for many years there is no CMO in the field of right to equitable remuneration for making a sound or visual fixation, and for photocopying of work in the field of private and other internal use, although mandatory collective management is prescribed for such rights (IPR Office rejected an application of one entity to obtain authorization). The same situation applies for the resale right due to the fact that even after more than a decade artists did not organize into a CMO. In Bosnia and Herzegovina[157] there were even efforts of IFRRO to support the initiation of a CMO in the field of reprographic rights, which, however, did not lead to a result. In this country there is also only one CMO in the field of CCM of rights in musical works, even though the Law on CCM offers the opportunity of establishing a CMO e.g. in the field of management of resale right and of private copying levy, which does not fulfill all the criteria prescribed by the LCM (provisional license). However, some of the former CMOs and also a new entity have applied for a license in different fields. The procedures for the four licenses are pending before the IPR Office since June/July 2012.

[152] *I. Gliha*, eight CMOs
[153] *D. Vuksanović*, Montenegro and *I. R. Mešević*
[154] *D. Vuksanović*
[155] *J. Dabovik-Anastasovska/N. Zdraveva*
[156] *M. Repas*,
[157] *I. R. Mešević*

Challenge: Disputes between the stakeholders in CCM and their resolution

The stakeholders in the field of CCM include the right holders, CMOs that represent them and users of the protected subject matter. However, also the government bodies in charge of controlling the establishment and supervision over the activities of CMOs can be party to disputes by means of appealing against their decisions in connection with CCM. All the parties involved have, to a certain extent, different interests and play different roles in the system of CCM. Accordingly, the potential for conflicts between them and the need for adequate dispute resolutions mechanisms exist.

The Croatian[158] Copyright Law has established a system of mediation for some specific situations, which is carried out by the Council of Experts on Royalties for Copyright or Related Rights. The latter plays a role in the control of CMOs tariffs but also acts as a mediator with regard to the access to a copyright work protected by technical protection measures (TPMs) and with regard to cable retransmission. The system for mediation related to the access to the copyright work protected by TPMs has not proven to be efficient so far. The Council of Experts has not yet reported any such cases. According to the contributor from Croatia, this is probably because the procedure requires a certain time period which the users most likely find too extensive. In Albania[159] there is no administrative body in charge of resolving disputes between CMOs and right holders and the court is the only responsible body to handle dispute resolution cases. The Albanian Copyright Office can have an advisory role. In the case of disputes with regard to conclusion of contracts on cable retransmission, if the parties fail to settle it amicably, the parties primarily address the Albanian Copyright Office. In Serbia[160] there also are no dispute resolution bodies with regard to disputes between CMOs, right holders and users under the current legislative framework. It should also be noted that, in the past, the representatives of CMOs and associations of users did not show willingness to compromise. For example, the activities of the Commission for copyright and related rights (established 2009/abolished 2012) were often blocked due to disputes between the two groups. The Commission of Mediation in Macedonia[161] has the main role in the assessment of the tariffs but also the jurisdiction to mediate in the conclusion of agreements for cable retransmission. However, if both parties request it, it may mediate in the conclusion of agreements for other types of use. The latter is appointed by the Government upon proposal of the Ministry of Culture and it consists of renowned independent and objective experts in the field of copyright and related rights. With regard to the disputes between CMOs and the license-issuing government body, one of the CMOs in the country is in the process of obtaining a license following a long administrative dispute.

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[158] *I. Gliha*
[159] *Z.Peto/O.Spiro*
[160] *D. Popović*
[161] *J. Dabovik-Anastasovska/N. Zdraveva*

The Slovenian[162] Copyright Law provides no special dispute resolution (governmental) body with regards to disputes between all the stake-holders (right holders, CMO and users) in the field of CCM. Disputes are solved before the competent courts. There is only mediation as an alternative dispute resolution method, which refers to disputes between the CMO and RAU concerning conclusion of an inclusive agreement for cable retransmission of broadcast only. There is also the Copyright Board, as was previously mentioned, concerning some disputes about tariffs. Nevertheless, there are also many disputes between CMOs and the IPR Office considering various issues in the field of CCM (refusal to grant authorization, tort claims against IP Office due to damage to reputation of CMO, action for damages against IP Office regarding the temporary authorization etc.).

In Bosnia and Herzegovina,[163] for the purpose of dispute resolution, the Copyright Law introduced mediation in the case of (dispute over) conclusion of general contract on cable retransmission; however, this mechanism has not been used so far. Notwithstanding the latter, similar to Slovenia, there are disputes between the former CMO in the field of authors' rights in musical works and the IP Office with regard to issuance of license to a new CMO.

Challenge: Efficient tariff setting bodies

Specific bodies in charge of settling disputes between users and CMOs with regard to the amount of remuneration to be paid to the right holders represent an important part of the dispute resolution system in the field of CCM (Challenge no. 9), enjoy their specificities and particular relevance, since the issue of tariffs is one of the pillars of the system of CCM. When no compromise can be found on the question of remunerations, a competent and authoritative body is needed to resolve this issue and ensure the functioning of the system of CCM.

The Copyright Board in Slovenia[164], which is not a government body and is in charge of regulating tariffs in case of dispute between CMO and representative association of users, passed only two decisions so far, although it was established in 2006. The reasons for that is mistrust, because members of the Copyright Boards are also users or representatives of users (lawyers) or members or employees or lawyers of the CMOs and the ambiguous provisions regulating this body. They concern the procedure expenditure (the duration of the procedure and the amount of reward for the members are not limited), the procedure before the Copyright Board (users that are not part of RAU cannot oppose provisional tariff), its nature and its composition (two members of the Copyright Board are appointed by the CMO- problem because the interest of the CMOs are so diverse that a consensus between CMOs is hard to reach). It also needs to be pointed out that the members of the Copyright

[162] *M. Repas.*
[163] *I. R. Mešević*
[164] *M. Repas*

Board should have sufficient knowledge in the field of copyright law and there is no corresponding provision of the Copyright law considering proof of such knowledge. In Bosnia and Herzegovina[165], although the Copyright Council (an independent body authorized to set an appropriate tariff, settle disputes in connection with conclusion of general agreements and examine its compliance with Copyright law and Law on CCM), was supposed to be established within six months from entering into force of the latter by the Council of Ministers of Bosnia and Herzegovina, it never was. The IP Office initiated the procedure, but according to the IPR Office, a sufficient number of applications for potential members was not received.

Challenge: Internal issues of CMOs (transparency, disputes with members, distibution etc.)

The standards for conducting the activity of CCM by the CMOs are usually prescribed in the respective laws governing this field. Nevertheless it is not unusual in the practice of CCM that there are internal conflicts within CMOs, whether they concern the relation between the CMO itself and the right holders it represents (transparency, distribution, supervision by the members, different treatment of members etc.) or the manner that the CMO is functioning as a legal entity.

For example, in Montenegro,[166] in one period a particular number of authors have expressed dissatisfaction with internal establishment of the national CMOs. Nevertheless, in the course of supervision and in a number of court proceedings it has not been established that it came to infringement of essential obligations of the CMOs and rights of the members by the CMO. The national IPR Office has, in the procedure of supervision, issued the order to the only CMO to publish one part of its reports and acts on its homepage. The contributor from Albania[167] reported that the work practice of a couple of CMOs has been negative. Firstly, with regard to obligations toward members, the Albanian Copyright Office has examined complaints regarding two CMOs for not paying remunerations to the members. As a consequence, the responsible Minister, following consultations with the Office revoked the license for one CMO and suspended the activity of the other. Nevertheless, the supervision over the distribution of the CMO's incomes still remains a problem. Also in Serbia[168] the CMOs face certain internal challenges. A group of right holders regularly questions the legality of activities of existing CMOs, especially the manner in which the distribution of collected fees is being conducted. In certain cases, the IPR Office intervened and requested that the distribution is organized in a more transparent way pro

[165] *I. R. Mešević*
[166] *D. Vuksanović*
[167] *Z.Peto/O.Spiro*
[168] *D. Popović*

futuro. Also, in Macedonia[169], the issue of distribution seems to be evident. There are internal disputes with this regard and also with regard to the differences in the treatment of authors vis-à-vis performers. Similar situation exists also in Bosnia and Herzegovina.[170] The only CMO has not held a meeting of the general assembly since May 2013, although according to its statute, the latter needs to be held at least twice a year. The Supervisory board was not established. The procedures of collection and distribution are, according to the number of members, non-transparent. Also, although Letters of Intent for bilateral collaboration by several foreign CMOs were issued, the CMO has so far concluded only one reciprocal contract with a foreign CMO and there are indications that it collects for the "world repertoire".

Challenge: Enforcement of rights managed by CMOs

In order for the CMOs to conduct their activities and to enforce the rights they manage in case of infringements by the users, a strong support from and cooperation with the relevant enforcement authorities of the respective state is needed. However, this cooperation and support is not always sufficiently provided.

For example, the contributor from Albania[171] states that CMOs do not yet have a full support by the state bodies and that they are left "at the mercy of fate" and that there is no effective supervision means for the violation of copyrights by copyright users. An insufficient intervention of Market Inspectorate in case of infringement and a lack of efficient enforcement by the competent authorities are also reported from Slovenia[172].

Challenge: Collection of remuneration from users

In relation to the previous Challenge no. 12 there is one particular activity of CMOs that is confronted with evident obstacles, namely the collection of remuneration from the respective users. Every CMO, regardless of whether is it operating in a generally functional system of CCM or not, is faced with this problem, to a smaller or a bigger extent. Some of the contributors specifically pointed out this issue.

In Slovenia[173] e.g. there are several disputes before the competent courts between CMOs and users regarding the payments, which are mainly due to awareness of copyright and to tariffs that refer to a legal fiction mentioned before. However, it has also been noticed in the practice of CCM that some CMOs don't send invoices to users on a regular basis and

[169] *J. Dabovik-Anastasovska/N. Zdraveva*
[170] *I. R. Mešević*
[171] *Z.Peto/O.Spiro*
[172] *M. Repas*
[173] *M. Repas*

then after several years claim remuneration and file actions before the courts against such users even in cases of statute-barred claims. In Montenegro[174] as well, the problems that the national CMO is facing are related to collecting of funds from the users. Although the number of related court proceedings is still high, a significant reduction of the latter can be noticed in relation to earlier years. As already mentioned above (Challenge no. 12) with regard to Albania, the low awareness level on copyrights produces negative consequences on the activity of CMOs, because, in the context of collection of remuneration from the users, these entities do not yet have a full support from the state bodies, the users and the authors/artists. There are no effective supervision means for the collection of remunerations and the CMOs are left "at the mercy of fate" and lack appropriate support from the state bodies in this context.

Challenge: Legal/factual monopoly of CMOs and the abuse of dominant position

It seems that the selected countries of the region clearly opted either for legal or factual monopoly of CMOs in their respective laws. Although this solution is regarded as favorable especially for smaller markets,[175] the potential for abuse of this dominant position and for creation of market distortions represents the other side of the coin.

According to the relevant national reports on challenges[176] the CMOs from Slovenia[177] and Bosnia and Herzegovina[178] have been subject to examination by national competition authorities due to abuse of dominant position. In case of Slovenia the Competition Authority found the abuse of dominant position by the CMO with regard to distribution of remuneration to the authors in non-transparent and discriminatory ways. In the case of Bosnia and Herzegovina, the Competition Council also found abuse of dominant position and, in the course of the proceeding, detected that the CMO for CCM of rights in musical works within the General agreement with three associations of broadcasting organizations unfoundedly and illegally expanded its competences in the field of protection of related rights as well. The Council also detected that the CMO provided tariff discounts in a selective manner (only to members of the mentioned associations). Comparable proceeding also took place before the Croatian Competition Agency[179] with regard to exercise of the right to remuneration for private reproduction, since the CMO was giving a special discount to members of the association of importers and distributors of IT, electronic and telecommunication products. Upon the request of small importers, the Croatian Competition Agency found that such conduct disrupts the competition (different conditions

[174] *D. Vuksanović*
[175] *I. Gliha*
[176] *M. Repas* and *I. R. Mešević*
[177] *M. Repas*
[178] *I. R. Mešević*
[179] *I. Gliha*

apply to equivalent transactions/ some entrepreneurs are put in the more favorable position). In another case before the Competition Agency the latter did not find distortion of competition. In Serbia[180] the national Competition Authority initiated ex officio proceedings against a national CMO aiming at determining whether its tariff, that prescribed unequal conditions that the CMO would apply when concluding 3-years contracts with different cable RTV operators, represented an anti-competitive agreement. The Competition Authority suspended the proceedings because the CMO modified the tariff in question following the initiation of proceedings. Another potential case of abuse of dominant position exists in Bosnia and Herzegovina[181] (so far has not been subject of a procedure before the Competition Council). Namely, the national CMO has so far concluded only one reciprocal contract with a foreign CMO, nevertheless there are indications that it collects remuneration from the users for the "world repertoire", convening to "assumption of CCM". A similar situation is also apparent in Albania,[182] where it has been detected that CMOs have undertaken the protection/CCM of works beyond their [licensed] competencies.

Challenge: Relations between CMOs

Close cooperation between individual CMOs in different fields of CCM in one country represent one of the essential elements of a functioning and efficient system of CCM, but also of the public appearance of this system. The national legislators of the Region, however, seem to be more concerned with the international relations of domestic CMOs (e.g. obligation to conclude bilateral agreements with foreign CMOs).

In Albania[183] e.g. the cooperation between national CMOs is only in its initial stage. In Croatia[184] on the other hand a good cooperation exists between CMOs in the field of music, creating a one-stop shop effect. Nevertheless, there are also cases in the CCM system, when conflict of interests between particular CMOs/their members hardly allow mutual cooperation e.g. as is the case with the musical performers' society and the phonogram producers' society, who disagree about giving authorizations and collecting the remuneration for the use of musical performances via digital services. The reason behind this conflict lies in the disagreement about which CMO is competent to exercise the related rights pursuant to existing individual agreements. In Slovenia[185] the cooperation used to be better before (e.g. in the field of collective management for private reproduction and for cable retransmission). Finally in Bosnia and Herzegovina[186] a certain deal of antagonism seems to exist between the

[180] *D. Popović*
[181] *I. R. Mešević*
[182] *Z.Peto/O.Spiro*
[183] *Z.Peto/O.Spiro*
[184] *I. Gliha*
[185] *M. Repas*
[186] *I. R. Mešević*

former and the current CMO in the field of musical rights (denunciations, administration actions etc.). According to the report of the national IPR Office, the foreign CMOs have postponed the conclusion of reciprocal agreements with the new CMO until the court passes a decision in the procedure initiated by an administrative action of the old CMO. How confusing such conflicts can be is also proven by the fact that the new CMO holds the status of a "provisional" and the old one the status of a "member" of CISAC.

Challenge: Mandatory collective management

Relevant laws of the countries of the Region regulating CCM at least, due to the harmonization with the EU-legislation, provide for a right of cable retransmission to be under the regime of mandatory collective management. Nevertheless, the catalogue of those rights is much more extensive. The latter poses the question how extensive the list of the mandatory collectively managed rights should be.

In Slovenia,[187] since there is no possibility for authors to revoke, or to prohibit collective management by the CMO in this case, the regulation of mandatory collective management poses special problems to e.g. unknown authors who wish to give their copyrighted works into use free of charge.

Challenge: Activites of other/foreign rights management bodies on the national territories of countries of the region

There is a general perception in the selected countries of the region that on their respective territories there are no activities of foreign/sui generis rights management entities other than the nationally licensed CMOs. Nevertheless, e.g. on the homepage of CELAS[188] it is stated that this entity also covers the territories of Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia and Albania.

[187] *M. Repas*
[188] *See*: http://www.celas.eu/CelasTabs/Territories.aspx.

Phase III and IV – Dealing with the Challenges and Eliminating the Challenges / Summary of Solutions for Challenges in the Field of Collective Management of Copyright and Related Rights

Prepared by: Dr. Iza Razija Mešević

Abbreviations

CCM: Collective Copyright Management
CMO: Collective Management Organization
IPR: Intellectual Property Rights

The following summary of solutions is based on the conventional and "outside the box"/non-conventional solutions for the challenges in the filed of collective management of copyright and related rights detected in Phase II (*Facing the Challenges: Summaries of national challenges in the field of collective management of copyright and related rights*) provided by the contributors from Slovenia (M. Repas), Croatia (I. Gliha), Bosnia and Herzegovina (I. R. Mešević), Serbia (D. Popović), Montenegro (D. Vuksanović), Macedonia (J. Dabovik-Anastasovska/N. Zdraveva) and Albania (Z. Peto/O. Spiro). The proposals/suggestions/solutions provided by the contributors aimed to target the specified challenges as such and are in principle not reduced only to the their own country.

The provided conventional solutions represent potentially effective, however apparent and standard solutions for particular challenges already suggested/applied in some other countries or discussed about in the contributors' own country).

The provided „outside the box"/non-conventional solutions represent new, non-obvious and innovative solutions, which aim for the best possible manner of functioning of the CCM-system, thereby disregard potential political obstacles and do not observe a particular challenge in an isolated manner.

Challenge: Setting of tariffs

Almost all of the contributors support the conventional solution that the tariffs should be a result of consensus/negotiations/consultations between all the interested stake- holders (CMOs, their members and the users),[189] or the CMOs and users[190] or associations of users (German solution-umbrella agreements; individual agreements only exceptional),[191] thereby taking into account the private nature of copyright and the principle of contractual

[189] *J. Dabovik-Anastasovska/N. Zdraveva*, Macedonia.
[190] *D. Vuksanović*, Montenegro; *I. R. Mešević*, Bosnia and Herzegovina; *D. Popović*, Serbia.
[191] *M. Repas*, Slovenia.

freedom[192]. Another proposed conventional solution in this context addresses the legislative framework in the countries of the region. Namely the contributors proposed and demanded clear and detailed methodology,[193] boundaries and clear definitions of terms (e.g. "association of users")[194] in the national copyright laws, for the setting of tariffs. Thereby the principle of proportionality must be applied, in order for all the specific business areas to be taken into consideration,[195] but also the principle of transparency, fairness and non-discriminatory treatment of users in the same category.[196] Also legislative stimulants for the creation of associations on the users' side (tariff deductions etc.) were proposed.[197] The individual setting of tariffs by the CMOs as a potential conventional solution was also suggested, but with some limitations. First of all, this method of tariff-setting should never be primary, but subordinated and applied in case the negotiations between CMOs and users failed, hence still subject to supervision by a supervision or an independent expert body.[198] The involvement of state bodies[199] was also proposed as a conventional solution with this regard, but also not as a primary instrument. Conventional solutions in case the negotiations between users and CMOs on tariffs fail were different. E.g. propositions in line with the German law were suggested, that in case of failed negotiations the license is presumed as granted to the user, if he pays the recognized amount of fee to the CMO, and the disputed amount is paid under reservation, or deposited in favor of the CMO.[200] The contributors also suggested the introduction of a temporary tariff by a specialized body[201] and final solution of a dispute on the amount of remunerations to be paid between CMOs and users before courts[202] (supported by the expert opinion of an independent expert body).[203]

With regard to non conventional solutions in this context, some contributors pointed out that from the provided national reports it is clear that the introduction of mediation, arbitration, special bodies etc, when the negotiations between CMOs and users fail, is not an operational and functioning solution in the practice.[204] Hence the outside the box proposal was to establish specialized courts[205] (or to entrust this function to the existing courts) empowered to settle the tariff disputes, where the judges (or jurors) should be specialized in

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[192] *I. Gliha*, Croatia.
[193] *Z. Peto/O. Spiro*, Albania.
[194] *M. Repas.*
[195] *Z. Peto/O. Spiro.*
[196] *M. Repas.*
[197] *I. R. Mešević.*
[198] *I. Gliha.*
[199] *Z. Peto/O. Spiro.*
[200] *M. Repas.*
[201] *D. Vuksanović.*
[202] *D. Vuksanović.*
[203] *I. Gliha.*
[204] *M. Repas.* This solution was initially proposed by the contributor as conventional.
[205] *D. Vuksanović.*

copyright law and independent from any CMOs or associations of users.[206] Other solutions in this context were to entrust the setting of tariffs completely to an independent and specialized body,[207] or to treat the tariffs as price of a good/service, thus enabling negotiations between the CMOs and users having in mind (and understanding) the roles and the activities they undertake and to the end the service they both provide to the public[208]. Another suggestion was, notwithstanding the private nature of copyright, to keep in mind that the CMOs also perform certain activities in the public interest (implementation of cultural policy, social and cultural activities in favor of right-holders, support to national cultural industry etc.) and to introduce "state imposed tariffs" in case of necessity (too long negotiations, obstructions of negotiations by the CMOs or users etc.).[209] They should be in force as long as it takes for the condition in the specific CCM field to consolidate and lead to negotiation on tariffs. Finally, there was also a proposition given to introduce a so-called global license for the users and to set the tariff as a percentage of the turnover of each user depending on the type of its business, which would be paid to an independent authority [not a CMO] on an annually basis. [210]

Challenge: Permanent changes in the legislation regulating CCM

In the context of this challenge it was pointed out by several contributors that the CCM- legislation should be seen as an instrument of a policy[211] and as a part of the overall legal system[212]. Hence, once the policy goals are set, the legislation will easily follow,[213] the general legal principles should be applied in order to resolve the ambiguities and fill the legal gaps before reaching for the instrument of law amendments[214] and also a regulation of particular issues that are already regulated at a general level should be as a rule avoided.[215] As a conventional solution also an involvement of wider audience in the process of law drafting,[216] e.g. by means of preliminary public consultation[217] or discussion[218] was suggested. Also the drafting of legislative provisions flexible enough not to be affected by technological changes,[219] thoroughly substantiated legislative proposals including regulatory impact

[206] *M. Repas.*
[207] *D. Vuksanović.*
[208] *J. Dabovik-Anastasovska/N. Zdraveva.*
[209] *I. R. Mešević.*
[210] *Z. Peto/O. Spiro.*
[211] *J. Dabovik-Anastasovska/N. Zdraveva.*
[212] *I. Gliha*; *I. R. Mešević.*
[213] *J. Dabovik-Anastasovska/N. Zdraveva.*
[214] *I. R. Mešević.*
[215] *I. Gliha.*
[216] *J. Dabovik-Anastasovska/N. Zdraveva.*
[217] *I. R. Mešević.*
[218] *D. Vuksanović.* This solution was initially proposed by the contributor as non-conventional.
[219] *I. Gliha.*

assessments,[220] avoidance of summary legislative procedures and lobbying activities by the stake-holders, and finally introduction of very detailed provisions on CCM or even a *lex specialis* in the field of CCM[221] were suggested.

When it comes to the "outside the box" solutions in this context, some contributors pointed out that for at least a certain period[222] of concretely within three to four years[223] after the adoption of a certain legislation/amendment in the field of CCM, another legislative change should not even be considered. The latter due to the fact that the stake holders (CMOs, right-holders users, courts etc.) need to apply the law in force and interpret its provision in order to make the system work, and not rely on the legislator to correct every ambiguity and fill every legislative gap.[224] It was also suggested that for this purpose the copyright owners could also seek the support of political parties from the opposition block, which would secure the legislative *status quo,* even in case of changes in the Government.[225] Some other contributors[226] suggested general de-regulation in the field of CCM or setting the state regulation to minimum. The latter would be a possible approach for the ever-changing market circumstances in which the CMOs operate that would result in industry self-regulation, general state oversight and decrease of expectations from the government to always provide up-to-date legislative solutions. Finally the third ones[227] proposed as an "outside the box" solution in this context a further unification of the rules in the field of CCM in the region, including legislation, regulations and practice, since in spite of all the political problems, the region is culturally getting closer than before. This unification would lead to long term well -based copyright and CCM-legislation.

Challenge: Underregulation, gaps, ambiguities and dicrepancies in the legislative framework for CCM

As a conventional solution to this issue few of the contributors suggested not to intervene into the primary legislation, but to attempt to fill the gaps and clear the ambiguities by means of introducing certain bylaws (secondary legislation)[228] or on the contrary, only a comprehensive *lex specialis* in the field of CCM[229]. Some contributors targeted in the proposed solutions to this challenge the reasons for its occurrence. The latter are namely the

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[220] *J. Dabovik-Anastasovska/N. Zdraveva.*
[221] *M. Repas* and the *lex specialis* solution also *I. R. Mešević.*
[222] *D. Popović.*
[223] *I. R. Mešević.*
[224] *I. R. Mešević.*
[225] *D. Popović.*
[226] *J. Dabovik-Anastasovska/N. Zdraveva.*
[227] *Z. Peto/O. Spiro.*
[228] *D. Popović; D. Vuksanović.*
[229] *I. R. Mešević; D. Vuksanović.*

lack of "sensibility" of the legislator for the problems in the practice of CCM[230] in the country and the region and missing analysis of all the aspects of CCM as part of the wider policy development process[231]. They emphasized the need of thorough examination of the current CCM-market[232] as well as the legislative priorities[233] before the legislative steps are taken.

In the context of the "outside the box" solutions to this challenge, particular contributors[234] suggested that the issue of under-regulation is often only apparent and caused by a lack of knowledge of legal possibilities, and of the understanding that the copyright system is just a part of the wider legal system to which the general rules apply. Hence, the idea of under-regulation often leads to overregulation that can often be inflexible and lead to inefficient protection. Again some contributors saw a solution for this problem in introducing wider unification of CCM-rules in the region.[235] Finally particular contributors[236] questioned the expertise of the legislator in this field and suggested a highly expert- guided legislative procedure in this context. They also pointed out that many of the gaps and ambiguities occur only in the parliamentary procedure due to political lobbying and not in the drafting phase of the CCM-legislation and again suggested strong presence and participation of experts in the legislative procedure up until the adoption of the laws in this field.

Challenge: "Bad image" of CMOS, lack of public awareness and understanding of CMOS and ccm and the issue of legal tradition

Many contributors suggested with regard to this challenge an active approach toward the improvement of the reputation of CMOs by awareness raising campaigns, increasing the knowledge of the rights' holders, the CMOs and the users but also of the population in general and media[237] on their "side of the story"[238] and improving transparency of conducting CCM by CMOs,[239] e.g. by setting "minimum data" standards for publication on their web site,[240] which has especially come into focus due to the new EU-Directive[241]. The suggestion

[230] *D. Vuksanović, I. R. Mešević.*
[231] *J. Dabovik- Anastasovska/N. Zdraveva.*
[232] *I. R. Mešević.*
[233] *J. Dabovik- Anastasovska/N. Zdraveva.*
[234] *I. Gliha.* The particular solution was initially proposed by the contributor as conventional
[235] *Z. Peto/O. Spiro.*
[236] *I. R. Mešević.*
[237] *D. Vuksanović; D. Popović.*
[238] *J. Dabovik- Anastasovska/N. Zdraveva.*
[239] *Z. Peto/O. Spiro.*
[240] *J. Dabovik- Anastasovska/N. Zdraveva.* This solution was initially proposed by the contributor as non-conventional.
[241] *I. R. Mešević.*

was also made to make the laws regulating CCM by more "approachable" to the citizens by adapting them to easy-readable brochures for dissemination.[242] Some contributors made it clear that it is the role of CMOs to correct the public misconception of their activities and purpose[243] and suggested a more proactive, instead of a reactive approach of these entities[244]. On the other hand, particular contributors agreed with that approach, however suggested that the CMOs should restrain from overly "showing muscles" and should not unnecessary provoke the payers of remuneration.[245] The latter contributor pointed out that change of perception towards CMO is a process that should start by convincing the users of the necessity to pay the remuneration, which belongs to the right holders and not CMOs as right managers. While the supporting role of enforcement bodies in this phase is very important, with time this awareness raises, hence the negative image should also tone down. Also other activities of CMOs were suggested aiming toward elimination of their "bad image" such as introduction of cost-reducing common (collective) bills[246] or their increased cultural and social engagement[247]. However not only the CMOs can improve their "public appearance", but also other subjects according to the solutions of some contributors.[248] The public misconception is often a result of the poorly educated journalists and media representatives on the role and the activities of CMOs, which results in sensationalist and distorted reporting in this context.[249] Hence these categories of subjects and entities should also be specifically targeted by the awareness and education campaigns.[250]

With regard to the non-conventional solutions, particular contributors suggested some "radical" ideas, potentially in the situation where the public image of CMOs is on a very low level, which makes it hard to achieve improvement with the proposed conventional suggestions. Hence, there is a possibility to abolish particular CMO-s and to establish only one, centralized CMO for each country, controlled by all the right holders of different types, having all the technical and administrative means[251] to conduct efficient CCM. By this mean the latter contributors potentially suggest the concentration of the CCM-activity in one organization and consequent avoidance of the possible confusion of users and public on the different fields covered by different CMOs that would possibly raise the trust and legitimacy of the one existing CMO.

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[242] *D. Vuksanović.* This solution was initially proposed by the contributor as non-conventional.
[243] *M. Repas*; *D. Popović; I. R. Mešević.*
[244] *D. Popović.*
[245] *I. Gliha.*
[246] *M. Repas.*
[247] *M. Repas*; *D. Popović.*
[248] *D. Vuksanović; I. R. Mešević.*
[249] *I. R. Mešević.*
[250] *D. Vuksanović; I. R. Mešević.*
[251] *Z. Peto/O. Spiro.*

Another non-conventional solution was to start with the public awareness raising process "bottom up",[252] by including copyright as an optional subject in primary or/and secondary school, which would definitely raise public awareness considering copyright – not only in the field of CCM but in general.[253] Another solution would be to organize special work groups for children and grownups, where they could be acquainted with copyright issues. There should be a legal obligation of the users in the public but also private broadcasting sector to cooperate with the CMOs in order to promote the importance of copyright and CCM in the course of their broadcasts.[254]

Challenge: Politics and CCM

Nearly all of the contributors recognize that the influence of politics in almost every field is very strong and that it would be illusory that the area of CCM could be left out,[255] which however can lead to obstacles and problems[256]. Particular contributors however addressed the issue on how much the political parties actually know on the CCM and how much they do understand their process[257] and therefore suggest activities aiming for proper information (education) of all relevant stakeholders on the functions of the copyright and related rights in general and in particular the CCM system.[258] As pointed out in a similar manner in the context of Challenge No. 5, certain contributors suggest that a specialized expert body should have the key role in initiating legal solutions in this field,[259] but also that the whole legislative process should preferably be expert- and not politically-guided[260]. It was also pointed out that the political influence in the field of CCM is often a result of lobbying activity of a particular group of stakeholders in the field of CCM (often users).[261] Hence a comprehensive consultation process including all relevant stake-holders and clear definition of legislative strategy in the field of CCM need to proceed the actual legislative procedure in order to minimize that influence.

With regard to the non-conventional proposal in this context, it was suggested that a creation of strong and autonomous CMOs that can defend their position from the interference of politics would have positive impacts.[262]

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[252] *I. R. Mešević.*
[253] *M. Repas.* This solution was initially proposed by the contributor as conventional.
[254] *I. R. Mešević.*
[255] *Z. Peto/O. Spiro; D. Popović; I. R. Mešević*
[256] *D. Vuksanović*
[257] *J. Dabovik- Anastasovska/N. Zdraveva.*
[258] Similar *D. Popović* and *D. Vuksanović.*
[259] *D. Vuksanović.*
[260] *I. R. Mešević.*
[261] *I. R. Mešević.*
[262] *Z. Peto/O. Spiro.*

Challenge: Boundaries of governmental involvement

Among the solutions proposed by the contributions in this context there seem to exist rather differing points of view. Some of the contributors pointed out that due to private nature of copyright, the line of that involvement is drawn at the detailed and strict legislation and supervision over the activities of CMOs,[263] or in the policy -setting field[264]. They even suggested as a non-conventional solution that the members of the potential relevant expert bodies for mediation/recommendation/decision-making in the field of tariff- setting should be selected by means of an open call and not be appointed by the government. The other contributors were not reluctant toward a more active involvement of public bodies in the field of CCM,[265] especially in the field of tariff setting,[266] which seems to be unavoidable in the countries where the system if CCM is facing difficulties in this aspect. Particular contributors[267] even regarded the presence and involvement of the government as necessary continuous in all the phases of creation and maintenance of a CCM- system (creation of legislative framework, training and education of enforcement agencies and other stake-holders, supervision over CMOs etc.) only with different intensity in different phases.

Challenge: Effective and permanent state control/supervision over the activites of CMOs

When providing solutions for this challenge, the contributors proposals focused mainly on the issues of clearly defined competences for the supervision, its permanent nature, the potential sanctions that need to be imposed as well as the staffing and expertise of the supervision bodies.

The first precondition for an efficient supervision over the activities of CMOs represents clear provisions on supervision competences in the national copyright/CCM laws,[268] development and implementation of monitoring plans,[269] permanent supervision[270] that starts with setting the conditions for the establishment of CMOs and the issuance of license for CCM[271] and continues with annual reports[272] as well as continuous monitoring of the compliance of CMOs with the prescribed requirements for CCM. Nevertheless many

[263] *I. Gliha.*
[264] *J. Dabovik- Anastasovska/N. Zdraveva.*
[265] *I. R. Mešević; D. Popović; Z. Peto/O. Spiro.*
[266] *I. R. Mešević; D. Popović.*
[267] *Z. Peto/O. Spiro.*
[268] *Z. Peto/O. Spiro.*
[269] *J. Dabovik- Anastasovska/N. Zdraveva.*
[270] *I. Gliha; M. Repas; I. R. Mešević.*
[271] *I. Gliha; I. R. Mešević.*
[272] *I. Gliha.*

contributors point out the necessity that the supervision could result in sanctions for CMOs such as revocation of license due to detected infringements.[273]

With regard to the staff conducting the supervision over the activities of CMOs, the contributors pointed out that in the countries with general IPR Offices, naturally more employees are involved in the field of industrial property.[274] Hence the copyrights/CCM divisions are not in the focus and could be understaffed. Therefore an analysis of needs for recruiting staff for the permanent supervision activities in the CCM-field has to be conducted and special attention needs to be drawn to the expertise[275] of that staff.[276] I any case, the contributors[277] suggested that the level of expertise of that staff should be improved by their participation on seminars, work-shops (especially abroad), conversation with CMOs about their practical problems to getting acquaint with the functioning of CMOs in practice. However, also a high level of ethics, the consequent application of law and immunity from the influence of lobbying by the interested parties should be required by the staff entrusted with supervision[278]. In general, the contributors state that the supervision should be entrusted to a state body specialized in the field of intellectual property (IPR office) or a specialized department in some adequate ministry, like Ministry of Justice or Culture.[279]

In the field of non-conventional solutions some contributors[280] proposed the possibility to instead of strong governmental supervisions increase the audit and internal and external performance evaluation. As a consequence, the oversight of the Government would be narrowed to analysis of those reports and acting only in cases of discrepancies. Another non-conventional solution[281] would be to keep the permanent and also annual supervision over the CMOs, however to introduce the instrument of a member-initiated supervision. Often the instruments of internal review by the members are not efficient. Hence a possibility of a supervision procedure by a government body introduced on the basis of a funded complaint by e.g. 10 % of members could contribute to a more efficient and transparent activity of a CMO.

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[273] *D. Vuksanović; I. Gliha; D. Popović; I. R. Mešević.*
[274] *I. R. Mešević.*
[275] Also *D. Vuksanović and M. Repas.*
[276] *J. Dabovik-Anastasovska/N. Zdraveva; I. R. Mešević.*
[277] *M. Repas.*
[278] M. Repas; *I. R. Mešević.*
[279] *I. Gliha.*
[280] *J. Dabovik-Anastasovska/N. Zdraveva.*
[281] *I. R. Mešević.*

Challenge: Number of CMOs covering different fields of CCM

The majority of contributors[282] are unanimous with regard to need to stimulate and encourage the right-holders/associations of right holders to establish CMOs in particular fields of CCM. The latter due to the fact that apparently they are not able to "spontaneously" establish these entities.[283] The role of governmental bodies with this regard should be indirect[284] and reduced to awareness raising campaigns, technical support and assistance for the application,[285] as well as constant cooperation of license -granting authority with the license-applying CMO in order to avoid the refusal of authorization[286]. Another potential solution for the stimulation of establishment of new CMOs[287] is to entrust technical tasks to the CMO with already established respective services.

Nevertheless, certain contributors also propose non-conventional solutions in this context, such as setting a deadline by the law for establishment of CMOs for fields were CCM is provided but CMOs do not exist.[288] Another solution of this type represents an establishment of a "one-stop-shop" or "generalist" CMO[289] that would cover different types of works and rights and would potentially be beneficial for the system of CCM in smaller countries since it would induce a reduction in transaction costs and simplify the transactions with users[290].

Challenge: Disputes between the stakeholders in CCM and their resolution

When proposing solutions for this challenge, some contributors[291] expressed the opinion that the competent courts do not represent the most adequate, efficient of qualified bodies for the solution of disputes between the stakeholders in this field, while the others[292] stated that court of justice has to be a body for resolving disputes between stakeholders in question. Nevertheless, a positive attitude among certain contributors also exists with regard to creation and competences of alternative dispute resolution bodies. The suggestions on the organization and nature of the latter however differ. Particular contributors suggest that the government body [in charge of supervision], should act as a mediator for internal disputes

[282] *I. Gliha*; *D. Popović; M. Repas; J. Dabovik-Anastasovska/N. Zdraveva.*
[283] *D. Popović.*
[284] *D. Popović.*
[285] *J. Dabovik-Anastasovska/N. Zdraveva.*
[286] *M. Repas.*
[287] *I. Gliha.*
[288] *J. Dabovik-Anastasovska/N. Zdraveva.*
[289] *I. R. Mešević; Z. Peto/O. Spiro.*
[290] *I. R. Mešević.*
[291] *D. Popović; I. R. Mešević.*
[292] *I. Gliha.*

within a CMO,[293] while others propose the use of the government -established mediation bodies (where such exist), or establishment of ad-hoc mediation bodies[294]. Also the introduction of an independent body of experts,[295] whose scope of work and competencies should be prescribed by the law[296] and that should have quasi-arbitral powers,[297] or an establishment of arbitration, or an arbitration department within the existing arbitration, or associations/chambers of the rights' holders and users' professional fields[298] with a list of national and foreign arbiters of indisputable authority and expertise[299] was suggested.

Other contributors[300] when proposing their solutions in this context expressed their skepticism toward alternative dispute resolutions bodies based on experiences with those mechanisms in the field of copyright and tariff setting, as well as the need for all parties to agree to that procedure[301]. However they do not exclude the possibility of their involvement.

The non-conventional solutions in this context involve suggestions on a special alternative mechanism for the resolution of dispute between CMOs and other stakeholders than their own right-holders. Namely an involvement of international dispute resolution body was proposed, in cases where the parties did not reach a mutual agreement during the [national] mediation procedure. The latter must guarantee fair and efficient procedures and professionalism.[302]

Challenge: Efficient tariff setting bodies

The solutions submitted for this challenge differ with regard to the point of view of the contributors on the justification of the involvement of a tariff setting body in the procedure of determining the tariffs.

Hence, taking particular account of the private nature of copyright, some contributors suggest solely a supervision authority of an independent expert body over the tariff setting procedure.[303] On the contrary, some other contributors[304] support the idea that in case the

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[293] *Z. Peto/O. Spiro.*
[294] *J. Dabovik-Anastasovska/N. Zdraveva.*
[295] *D. Popović; D. Vuksanović* (only for internal disputes- CMOs and right-holders).
[296] *D. Vuksanović.*
[297] *D. Popović.*
[298] *J. Dabovik-Anastasovska/N. Zdraveva.* This solution was initially proposed by the contributor as non-conventional.
[299] I. *Gliha.*
[300] *I. Gliha; M. Repas.*
[301] *I. Gliha.*
[302] *Z. Peto/O. Spiro.*
[303] *I. Gliha.*
[304] *D. Popović; J. Dabovik-Anastasovska/N. Zdraveva; D. Vuksanović.*

negotiations between users and CMOs fail, the tariffs should be set by an independent body of experts. However, such an expert body should act in accordance with precise and detailed rules on tariff determination, which would avoid the tariffs being perceived as "unfair" by the users[305]. The members of such body should dispose with high and versatile specialization und be subject to continuous training[306]. Also suggestions were made that a tariff determined in such manner should be of temporary nature und that the respective tariff setting independent body should be under governmental supervision, in order to avoid eventual misuses[307].

Bearing in mind the fragility of institutions/CMOs in the region, their lack of experience in the area of tariff setting and the lack of confidence in the quality of their work, a non-conventional solution was proposed to temporarily transfer the competence on tariff setting to an experienced foreign tariff setting body, or to a body specially established by the European Union for this purpose. This transfer of competences would increase the confidence of the involved stakeholders and the public. The other possibility would be to appoint foreign experts into the national tariff setting body.[308] Other outside the box solutions in this context includes also a temporary transfer of tariff setting competences of CMOs, irrespective of the outcome of tariff negotiations, until stabilization in the collective management practice in certain sectors has been established, to a governmental tariff setting body of experts.[309] Further it was proposed to set up a tariff determining body with short-term mandates and a possibility for their extension based on internal and external evaluation of the activities of this body.[310] Finally also in this context the above -mentioned solution including the introduction of a so-called "global license" was once again underlined.[311]

Challenge: Internal issues of CMOs (transparency, disputes with members, distibution etc.)

With regard to the solutions to this challenge, a number of contributors[312] pointed out the need to introduce or increase the existing legal requirements on transparency of CMOs, which would also be clearly in line with the new EU-directive in this field[313]. Specific requirements to be incorporated into national laws but also internal acts of CMOs such as accountability and information on collection and distribution,[314] publication of statutes and

[305] *D. Popović.*
[306] *J. Dabovik-Anastasovska/N. Zdraveva.*
[307] *D. Vuksanović.* This solution was initially proposed by the contributor as non-conventional.
[308] *D. Popović.*
[309] *I. R. Mešević.*
[310] *J. Dabovik-Anastasovska/N. Zdraveva.*
[311] *Z. Peto/O. Spiro.*
[312] *J. Dabovik-Anastasovska/N. Zdraveva; M. Repas*
[313] *I. R. Mešević.*
[314] *J. Dabovik-Anastasovska/N. Zdraveva; I. Gliha; M. Repas.*

tariffs,[315] the insight into the documents of the CMO and the right to engage an external independent expert for the examination of CMOs documents and business operation,[316] the preparation of annual reports of CMOs and the functioning of the assembly[317] etc. were suggested. Also the introduction of an efficient electronic monitoring system for the detection of uses in order to avoid that the total amount of fees collected is subject to different interpretations, was proposed as an instrument for the increase of transparency of collection and distribution.[318] However, it was also proposed to establish clear internal organization of CMO-s, by defining the competencies for each governing body.[319] As an instrument for the prevention of internal conflicts, the participation rights in the assembly provided to all the members was suggested.[320]

In case that disputes still occur, the non-conventional[321] suggestion was made to introduce specialized administrative/court bodies for handling complaints against the CMOs by the right holders. Also a few contributors[322] suggested also a non-conventional solution that the right holders should be entitled to initiate an inspection procedure by the competent body, irrespective of their *ex officio* supervision over the activities of CMOs and possibility to impose sanctions. Another proposed option was to either mandatory introduce or clearly define dispute resolution mechanisms within the CMOs founding/functioning acts[323] entitled to solve disputes between the CMOs and the right -holders it represent that would be comprised of independent non-member experts.[324].

Challenge: Enforcement of rights managed by CMOs

The solutions proposed by the contributors aimed especially toward the activities of inspectorates and courts.

As a precondition to an effective enforcement of the rights they manage, the CMOs need to enjoy the procedural standing in the judicial proceedings and in general be able to initiate on its behalf and carry out different proceedings.[325]

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[315] *Z. Peto/O. Spiro.*
[316] *D. Vuksanović.*
[317] *M. Repas.*
[318] *D. Popović.*
[319] *Z. Peto/O. Spiro.*
[320] *I. R. Mešević; M. Repas.*
[321] *J. Dabovik-Anastasovska/N. Zdraveva.* This solution initially proposed by the contributor as conventional.
[322] *I. Gliha; I. R. Mešević.*
[323] *J. Dabovik-Anastasovska/N. Zdraveva.*
[324] *I. R. Mešević.*
[325] *I. Gliha.*

With regard to the inspectorates, there was almost a general demand expressed[326] on the need to improve the manner of their operation as well as the expertise and number of their staff. Also a demand for an establishment of a special police division for the field of copyright/IPR was expressed.[327] Nevertheless it was also suggested to stimulate and intensify cooperation and coordination between inspectorates and other enforcement bodies, such as police forces and customs.[328]

When proposing solutions for the improvement of court proceedings, the contributors pointed out the need for injunctions[329] and the application of the rules of summary proceedings[330] on disputes with regard to rights that are collectively managed. Also it was suggested that when determining the violation of collectively managed rights before the courts it should be sufficient for the CMO to prove that the violation occurred without establishing the violation for a particular right holder.[331] Also measures such as the raising of awareness on copyright with the goal to avoid as far as possible the infringements of copyright and adequate sanction that would ensure general and special prevention were suggested.[332]

With regard to the non-conventional solutions[333] a potential establishment of a regional/transnational police [coordination] force in the field of IPR/copyright was suggested.[334] Furthermore, a proposal on introduction of authorization of a CMO was made, to initiate procedures before state bodies, such as police, inspectorate and customs also in cases when they have information raising [only] reasonable doubt about violation of rights entrusted to them.[335] Also a necessity to perform a concentration of the court jurisdiction for disputes in the field of IPR/copyright in the countries of the region, irrespective of their state organization, was stressed.[336] Finally the proposal to enhance and expand the role of the national IPR Office in the field of enforcement was also expressed.[337] The latter by means of entrusting the coordination of enforcement bodies in the country and overall responsibility for efficient enforcement of IPR rights/copyright to this body.[338]

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[326] *Z. Peto/O. Spiro; I. R. Mešević; D. Popović; M. Repas.*
[327] *Z. Peto/ O. Spiro.*
[328] *I. R. Mešević.*
[329] *Z. Peto/ O. Spiro.*
[330] *D. Popović.*
[331] *I. Gliha.*
[332] *M. Repas.*
[333] Some of the further solutions were initially defined by the contributors as conventional, but in the given context of the region, it seemed more appropriate to characterize them as non-conventional.
[334] *Z. Peto/ O. Spiro.*
[335] *I. Gliha.*
[336] *I. R. Mešević.*
[337] *I. R. Mešević; D. Vuksanović.*
[338] *I. R. Mešević.*

Challenge: Collection of remuneration from users

The solutions delivered by the contributors in this context targeted the prevention of disputes between CMOs and users with regard to payments but also the best methods of resolving these dispute after they occur.

Some of the suggested preliminary measures were the introduction of tariff agreements between CMOs and users (agreed and not unilateral tariffs),[339] adoption of a "one stop shop" system, a so -called "global license",[340] or the instrument of collective invoices including all or some national CMOs,[341] awareness raising of users,[342] uninterrupted work of the CMOs (timely delivery of accounts, control of the use, sending payment reminders etc.),[343] establishment of mechanisms for usage assessment and collection of remunerations based on actual profits from the use rather than gross profits and establishment of electronic means of measuring the usage including rules for check and double-check by CMOs, users and rights' holders[344].

With regard to the solutions the contributors proposed in case the disputes already occurred, professional education of state bodies (in the first place the courts,[345] police and customs) with support of international expert and financial assistance. By this means the efficiency of these bodies would be increased as well as the number of solved disputes that would potentially result in decrease in number of eventually new disputes.[346]

Challenge: Legal/factual monopoly of CMOs and the abuse of dominant position

The contributors delivered divided opinions when proposing solutions for this challenge. Some of them suggested that the benefits of the dominant/monopoly position of CMOs are larger then negative aspects of such status.[347] At the same time they pointed out the need to sanction the abuse of such position by the competent competition authorities. In order to achieve this balance, the contributors[348] suggest that those sanctions need to be individualized and high enough to prevent infringements in the future as well as take into consideration that they also affect the right-holders represented by the respective CMO. As

[339] *M. Repas.*
[340] *Z. Peto/ O. Spiro.*
[341] *I. R. Mešević.*
[342] *I. Gliha; M. Repas.*
[343] *I. Gliha* and similar *M. Repas.*
[344] *J. Dabovik-Anastasovska/N. Zdraveva.*
[345] *D. Vuksanović.*
[346] *D. Vuksanović.*
[347] *I. Gliha; M. Repas*; *I. R. Mešević.*
[348] *M. Repas.*

another proposed solution represents a closer cooperation and exchange between the competition authorities and national IPR Office.[349] Finally, a higher level of transparency and stricter supervision by the competent authorities (IPR Offices), but also members would according to some contributors[350] lead to prevention of abuse of a dominant position of CMOs. On the other hand, certain contributors[351] proposed a legislative possibility for establishment of more than one CMO in a specific field, combined with the possibility of transfer of rights from one to another CMO in a simple procedure and without elaboration of reasons. Also others[352] suggested that the right-holders should not be put in a position to entrust to the dominant CMO-s all of their future rights, but that a balance needs to be found.

With regard to non-conventional solutions to this challenge, it was proposed to limit the number of members of a CMO and/or the number of works one CMO may manage in case of competition among CMOs.[353] Hence once the maximum is reached the members would have to transfer/distribute their work for management to another CMO.

Challenge: Relations between CMOs

The contributors recognized many positive effects of this type of cooperation and hence proposed a number of solutions in its favor. The latter include the collaboration of CMOs with no opposed interests,[354] the general stimulation of cooperation but with clear and precise delimitation of the rights management boundaries of the collaborating CMOs,[355] the close type of cooperation in form of development of "one stop shop" mechanisms,[356] the issuance of collective invoices to the users,[357] or the creation of "umbrella societies"[358]. However some contributors[359] also proposed a de-regulation in this field in the way to leave the decision on the establishment and maintenance of the relations with other CMOs to the concerned parties.

[349] *D. Vuksanović.*
[350] *I. R. Mešević.*
[351] *J. Dabovik-Anastasovska/N. Zdraveva.*
[352] *Z. Peto/ O. Spiro.*
[353] *J. Dabovik-Anastasovska/N. Zdraveva.*
[354] *I. Gliha.*
[355] *M. Repas*; *Z. Peto/ O. Spiro.*
[356] *Z. Peto/ O. Spiro.*
[357] *I. R. Mešević; M. Repas.*
[358] *I. R. Mešević.*
[359] *J. Dabovik-Anastasovska/N. Zdraveva.*

The non- conventional solutions in this context include the introduction of mandatory consultations (joint meetings) between the CMOs in same field[360] or a creation of regional association of CMOs modeled in line with GESAC[361].

Challenge: Mandatory collective management

In the context of this challenge, every given suggestion/solution could be observed both as conventional and non-conventional. The latter since it eventually either fully supports the concept of mandatory management and advocates its expansion, or it objects the introduction of this instrument and proposes alternatives.

Hence on one side some contributors[362] draw attention that mandatory right management is in deep contradiction to the autonomy/will of the right holders to choose whether or not they want to be involved into collective copyright management. The others[363] suggested a re-assessment of the needs for mandatory collective management of rights and its narrowing to areas where such management would be either impossible on individual level,[364] or only where a real interest of the right- holders exists[365]. Also a need for revocation or prohibition of such mandatory rights management in cases when right-holders wish to grant the use of works free of charge was stressed.[366] Another proposal in the same direction[367] was to introduce deregulation in this field in the sense of transformation of the mandatory to voluntary collective management. Consequently the mandatory collective management could potentially only be introduced for the rights for which the rights' holders already established CMOs. In the latter context it was also suggested[368] to introduce deadlines for the establishment of CMOs in the fields where mandatory collective management was prescribed. The latter because in the region the right-holders seem to face difficulties in establishing new CMOs in general. In case that within the given deadlines the CMO is not established, the right holders should not be prevented to manage their rights in an individual manner.

On the other hand, some contributors[369] suggest the expansion of mandatory collective management to broader categories of right and expect the increase in the efficiency of right management in this manner.

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[360] *J. Dabovik-Anastasovska/N. Zdraveva.*
[361] *I. R. Mešević.*
[362] *Z. Peto/O. Spiro.*
[363] *J. Dabovik-Anastasovska/N. Zdraveva.*
[364] Also *I. R. Mešević and M. Repas.*
[365] Also *M. Repas.*
[366] *M. Repas; I. Gliha.*
[367] *J. Dabovik-Anastasovska/N. Zdraveva.*
[368] *I. R. Mešević.*
[369] *D. Vuksanović.*

Challenge: Activites of other/foreign rights management bodies on the national territories of countries of the region

Some of the contributors[370] represent the point of view that services offered by CELAS or similar organizations do not constitute collective right management, but "mass" exercise of "individual" rights. Hence the users have to make the clearance of rights with both, the CMOs and them (rights management with elements of both individual and collective management). It could therefore be presumed that the latter contributors see no difficulty in the "coexistence" of national CMOs and CELAS (or similar entities) in the region. The other contributors[371] firstly suggest an introduction of general legal obligation of CMOs to cooperate with CMOs outside the national boarders and as a non-conventional solution the establishment of official contacts with such organization claiming to be active on the national territories of the countries in the region. The third ones[372] propose the application of principle of free competition when dealing with these entities. Nevertheless there are contributors[373] who suggest the introduction of same regime of prior authorization and permanent supervision of foreign CMOs or other rights management entities as applied for the national ones. In line with that suggestion they[374] also propose the restriction of functions of foreign CMOs in the region only to cooperation/reciprocal representation agreements with national CMOs.

As to the non-conventional solutions in this regard, there were propositions[375] to explicitly define the position on the activities of foreign CMOs/entities on the national territories in national laws (either to recognize or to forbid). Also it was also suggested[376] to initiate the more active approach of the national IPR offices/competent bodies in the region. The latter in the sense that they should be the ones to establish contact with the foreign CMOs/rights management entities, demand information on the nature and legal basis of their activities and if necessary require for them to apply for a license or abolish their activities on the national territories.

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[370] *I. Gliha.*
[371] *D. Vuksanović.*
[372] *D. Popović.*
[373] *J. Dabovik-Anastasovska/N. Zdraveva; I. R. Mešević.*
[374] *J. Dabovik-Anastasovska/N. Zdraveva.*
[375] *J. Dabovik-Anastasovska/N. Zdraveva.*
[376] *I. R. Mešević.*

EU Challenges and Solutions in the field of Collective Management of Copyright and Related Rights

Collective Management in the EU

Contributor: Dr. Silke von Lewinski*

Introduction

In the EU, to date, experience with collective management law has only been made on the basis of national laws, and on the basis of the Treaty (first: EEC Treaty, then EC-Treaty, followed by the Lisbon Treaty) and case law of the European Court of Justice (now: the "Court of Justice"), mostly as regards competition law and, recently, regarding the EU Directive on Services,[377] which was held not to apply to collective management organizations (CMOs).

The Directive on collective management[378] only was adopted on 26 February 2014 and will have to be implemented until 16 April 2016. Still, it also includes challenges that will be taken into account in this concept paper.

Accordingly, the challenges for CMOs as experienced so far are mainly to be considered against the national law background. In this respect, one has to recall that – as for authors' rights law in general – national laws in the EU (as in general) differ fundamentally between countries of the anglo-saxon (UK, Ireland) and the Continental European system (the other 26 EU Member States). Among the most important differences is the low level of regulation of activities of CMOs in countries of the anglo-saxon system, where usually only questions regarding the establishment of tariffs (ie, user-related questions) are regulated by law. The control of CMOs under the aspect of their typical character as monopolies is usually left to general competition law. By contrast, the typically much higher level of regulation in countries of the Continental European system not only covers the relation of CMOs with users (including the establishment of tariffs), but also their relation with right owners; in addition, laws often provide a specific control that prevails over a general competition control.

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[377] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Official Journal L 376 of 27 December 2006.

[378] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, Official Journal L 84/72 of 20 March 2014.

Moreover, authors generally have a better position and representation in CMOs in countries of the Continental European system – in some countries, CMOs are even designated as 'authors' societies' ('sociétés d'auteurs'), and some do not include owners of derived rights as members, such as publishers; relevant rules are often meant to guarantee an appropriate position of authors versus entrepreneurs within the collecting society, for example by particular group voting procedures. By contrast, entrepreneurs such as publishers seem to have a much stronger role in countries of the copyright system.

Furthermore, the functions of CMOs differ: in the anglo-saxon system, CMOs in principle exercise the mere economic function of collectively administering rights so as to reflect the property of the individual rights owners whose works are used. In the Continental European system, CMOs usually have additional social and cultural functions that are sometimes even mandated by law. Within a CMO it may be a legal obligation or simply an acknowledged practice to agree on establishing social funds to assist authors in circumstances of social need, or cultural funds in order to promote the publication of works, to grant awards or scholarships, or otherwise to promote young artists or other eligible persons. The Court of Justice recently has approved that feature of CMOs. Apart from such funds, cultural evaluations may serve to promote particular categories of works that may be of a high cultural value but not be extensively used, like with poetry. Such basic differences between categories of works may be taken into account through systems of distribution, under which a higher number of points than earned on the mere basis of frequency of use is awarded to certain categories of works. In countries of the author's rights system, CMOs are generally also seen as cultural organisations, for which the principle of solidarity among authors is important, rather than as entities fulfilling a mere economic task as those in the anglo-saxon system.

Accordingly, also in the context of CMOs, the Continental European system primarily seems to take care of needs of authors rather than those of entrepreneurs, and to follow a comprehensive approach – including economic, social, and cultural aspects – rather than a purely market-based approach; the anglo-saxon system on the other hand focuses on the property aspect of copyright. These differences are also reflected in terminology: the for a long time prevailing term in English language, 'collecting societies', reflects the purely economic approach and is even wrongly limited to the aspect of 'collection' of fees from users rather than distribution to authors. Terms used in other languages in Continental European system countries, such as 'societies of author's, 'societies for the protection (or safeguard) or rights', reflect the more comprehensive approach under this system.

Since also quite some differences exist in the laws within, in particular, the Continental European system, this concept paper will focus on the situation under German law and practice.

In most European laws regarding CMOs, one may find provisions on the permitted legal forms of CMOs, and on their tasks such as granting licenses to users, collecting the

remuneration and distributing it to the individual right owners, establishing tariffs and rendering account. Also certain rights of CMOs may be laid down, such as the right to receive information from organisers of public performances of works on the individual works used, or rules that facilitate law suits by CMOs on behalf of their right owners, in particular by a legal presumption that the CMO represents the rights of all concerned right owners. Most of the rules, including those just mentioned, have to be seen in the context of the specific characteristics of CMOs, namely the monopolistic character prevailing in European countries. Experience throughout decades has shown that it is most favourable both for users and for right owners to have only one CMO in a certain field in a country, for example only one CMO regarding different kinds of exploitation of musical works, another one regarding literary works or artistic works and yet others regarding different kinds of subject matter of neighbouring rights protection. In most European countries, CMOs are de facto monopolies, whereas in a few countries, such as in Italy, a legal monopoly has been established. The Court of Justice has in principle approved such monopoly situation.

Generally, a monopolistic position of a CMO involves the possibility of its abuse, for example by an inappropriate or even lacking distribution of the collected remuneration towards the right owners, or also by the establishment of unjustified tariffs towards users. The aim of avoiding or sanctioning such possible abuses of the monopolistic position of CMOs has been reflected in a number of different rules under the relevant European laws.

Most countries have established different forms of supervision of CMOs in the framework of copyright legislation. The advantage of this approach (as opposed to the mere application of general competition laws) lies in the possibility of taking into account the particularities of the field of authors' rights and neighbouring rights. Since works are immaterial goods, they are particularly fragile and vulnerable to infringement. In some areas, CMOs are the only realistic way for authors and neighbouring right holders to benefit from their legal rights. Collective administration of these rights thereby may help authors to continue their creative activities and contribute, in the end, to the cultural wealth and cultural diversity.

As regards forms of supervision, one may distinguish between preliminary forms of control, which apply at the moment of the foundation or beginning of activities of a CMO, and a permanent control of its ongoing activities. The preliminary control may consist for example in the obligation to register a CMO or, as a stronger form of control, in the need to obtain a state permission to act as a CMO, as is the case under German law. The permanent control may consist in respect of activities towards the users or also towards the right owners, or both. Many of the rules not only reflect the aim of preventing any abuse of the monopolistic position of CMOs but also the aim of securing the efficient enforcement of rights by reliable and competent, responsible persons within the CMOs. In many laws, both forms of supervision are provided cumulatively.

In order to avoid an abuse of a monopolistic situation, in particular, § 6 (1) of the German Law on collective management (CAL) lays down the obligation of the CMO to administer rights and claims relevant to its sphere of activity, at the request of any right holder (of a determined nationality or residence), on equitable terms and where an efficient administration of these rights would otherwise not be possible. In other words, under the specified conditions, the CMO must not refuse the administration to any relevant right owner. This restriction of contractual freedom prevents a possible abuse of the monopolistic position, certainly in a better, more fine-tuned way than any general antitrust laws would do.

Another obligation of CMOs is the distribution of the collected remuneration according to fixed rules, the so-called distribution scheme, which must exclude any arbitrary action in the context of the distribution (§ 7 (1) CAL). Accordingly, the right owner must have the possibility to know the criteria according to which the collected money is distributed; thereby, any preferential treatment on a personal basis or the like shall be excluded. Moreover, this provision has been interpreted as requiring equitable criteria for the distribution.

Other obligations of CMOs towards their right owners are the establishment of the annual balance and further obligations in the context of accounting as specified in § 9 CAL. This obligation is essential in creating trust of the right owners and protecting them against any irregular uses of the money which is due to them.

Furthermore, one of the cornerstones of the German law is the obligation of CMOs to grant licences to any person so requesting on equitable terms, regarding the rights that it administers (§ 11 CAL). This limitation of contractual freedom corresponds to the obligation to administer rights of any right holder upon his request as specified in § 6 (1) CAL. Of course, this obligation constitutes a weakening of the full exclusive rights of authors and other right holders; however, these rights are still stronger than a provision of a legal licence would be. The CMO is not obliged to grant the right under any conditions but may negotiate in particular about the licensing fees. If the parties do not agree on the amount to be paid, the user may pay the required amount to the CMO with reservation of a later clarification by the arbitration body or the courts, or may just make a deposit payment. In this case, the law presumes that the license has been granted (§ 11 (2) CAL). This legal presumption allows the exploitation of works before an agreement on the amount to be paid has been settled, while the latter question may be clarified by the arbitration board, and if needed, also the courts.

Another obligation in favour of the users has been established in the context of § 11 CAL: Since users who want to acquire a licence need to know whose rights are administered by the CMO, the CMO is obliged under § 10 CAL to give information to any user who requires so in written form, on the question of whether or not it administers rights in a particular work or claims for a particular author or holder of a neighbouring right. In

addition to the obligation to grant licences under § 11 CAL, § 12 CAL provides a similar obligation in respect of the particular case where associations of users of the relevant works or achievements want to conclude so-called inclusive contracts with the CMO. Such inclusive contracts constitute a kind of framework contracts between the society and the associations of users where general conditions of licensing are agreed on. The additional contracts with the individual users may then refer to the already negotiated and agreed conditions of the inclusive contract. The advantage of such inclusive contracts is, accordingly, the fact that they save quite a lot of administration costs (for example by reducing the negotiation time enormously) so that more money is available both for the right owners and for the users who are regularly offered discounts of up to 20 % on the tariffs for individual contracts. Therefore, inclusive contracts may be very useful for both sides and they are quite popular; for example, the German Association of Concert Organizers has concluded such a contract with GEMA.

However, CMOs are not obliged to conclude such contracts if it were burdening or unreasonable, for example in the case where a user association has only very few members or the expected amount of income would not economically justify the effort of negotiating and concluding an inclusive contract.

Finally, the CMOs are obliged to establish tariffs regarding the rights and claims which they administer; where inclusive contracts have been negotiated, the agreed fees are considered as being tariffs (§ 13 CAL). The law also lays down criteria for the establishment of the tariffs, in particular the economic advantages that are obtained by the exploitation. However, other bases of calculation are admitted where they result in adequate criteria for the proceeds of exploitation that may be assessed with reasonable economic effort. In any case, the proportion of the use of a work in the total exploitation shall be taken in due account. Also, religious, cultural and social interests of the persons liable to pay the remuneration, including the interests of the youth welfare, must be taken into account (§ 13 (3) CAL).

The permanent control by the supervisory authority, the German Patent and Trademark Office, extends to all these obligations of CMOs. In order to be able to efficiently control the activities of CMOs, the authority may at any point of time demand from CMOs any information on matters concerning their conduct of business and require to see their books or other business papers. The authority also has the right to participate in the assemblies of members and the meetings of the relevant supervisory board or advisory board where such exists (§ 19 (3), (4) CAL). The CMOs themselves are obliged to inform the supervisory authority of any change concerning the persons entitled by law or by the statutes to represent them. In particular, they must submit any amendment to the statutes, the tariffs and any alteration thereof, the inclusive contracts, agreements with foreign collecting societies, the resolutions of the meeting of members, of any supervisory board or advisory board and of all committees, the annual accounts, annual report and auditors' report and any decisions in judicial or official proceedings to which they are party, where the supervisory

authority so requires (§ 20 CAL). If the supervisory authority finds out on the basis of this information that the CMO does not fulfil its obligations under the law, and this even despite a warning by the authority, it may revoke the permission granted under § 2 CAL (§ 4 (1) n. 2 CAL). If a CMO then acts without the permission, the authority may forbid the continuation of its business; in addition, it may take all necessary measures to guarantee that the CMO complies with all its other obligations in due order (§ 19 (2) CAL).

As a special form of control of CMOs, one may consider the different mechanisms of arbitration which may be found in different national laws of Europe. The German law shall serve as an example again: the arbitration board must be applied to with respect to disputes to which a CMO is a party, if the disputes concern either the use of works or performances protected by the Copyright Act, or the conclusion or amendment of an inclusive contract. Only after proceedings before the arbitration board have been concluded, the dispute may be asserted in court proceedings (§ 16 (1) in connection with § 14 (1) n. 1 CAL). In addition, the arbitration board may be called upon in respect of disputes to which a broadcasting organisation and a cable operator are a party, if they concern the obligation to conclude a contract for cable retransmission. This is rooted in EU law (§ 14 (1) n. 2. CAL). If the settlement proposed by the arbitration board is not opposed in written form within one month of service of the proposal of settlement, it shall be deemed to have been accepted and an agreement corresponding to the content of the proposal to have been entered into; it is then enforceable (§ 14 a (3), (4) CAL). Otherwise, the dispute may be continued in the civil courts.

Challenges

Challenges mentioned here are only selected ones in national laws (mostly according to experience in Germany) and against the background of the Directive that has to be implemented into national law until April 2016, and current discussions on copyright law in the EU and certain Member States.

1) Distribution of revenues among authors and derived right holders

According to a longstanding practice based on distribution schemes of CMOs that have been agreed by their competent bodies, revenues from different remuneration, such as private reproduction, are usually distributed between authors and derived right holders, in particular publishers. Distribution may be based on percentages, such as 50: 50 or 70: 30. This practice occurs irrespective of whether the author or the publisher has transferred such right to the CMO (where the author first concluded a contract with a CMO, he transferred that right; where the author first concluded a contract with a publisher for a given publication, he transferred the right regularly to the publisher who then transferred it to the CMO). Distribution schemes are usually agreed on by the authors and publishers represented in CMOs inside the relevant bodies.

In Germany, § 63a Copyright Act provides that statutory remuneration rights cannot be renounced by the author and may only be transferred to a CMO or, together with the publishing right, to a publisher, if he asserts the right through a CMO that collectively administers rights of authors and publishers. The second half of that provision was to express the above practice as being permitted, but was not clearly formulated. An author, who is a member of one CMO, submitted a complaint against that CMO for not granting him 100% of the revenues in cases in which he had transferred the remuneration rights to the CMO first, rather than to the publisher, on the basis of §63a Copyright Act. Other authors in other cases, including on exclusive rights in other CMOs, also submitted similar claims.

The first case has been decided in two instances under the civil law rule of "priority" of transfer in favor of the author. It is now pending before the Federal Court (supreme court). One other case has been decided in first instance in favor of the CMO.

The challenges concern the interim period (which may be long) during which the final result is not adopted and known. Here, the question is whether the CMO should continue distributing remuneration to all of its right holders according to the currently valid distribution scheme (which has not put into question by the supervisory body) or to the system requested by the court (after checking the priority of transfer). The second challenge concerns the possible, final confirmation of the "priority" rule. This would necessitate an individual screening for each author of the individual contracts in order to find out for who, and which works rights have been first transferred to the publisher or to the CMO. This administrative effort, to the extent such verification would in fact be possible for the CMO (usually, publishing contracts are with the right owners), would result in an in inappropriate amount of administration costs, which would have to be deducted from the revenues available for distribution to right owners.

The problem is also indirectly an issue in a Belgian case that is currently pending before the Court of Justice.

2) Obligations by Directive regarding unknown right holders (Art. 13 (3))

The Directive requires identification and location of unknown right holders, connected with burdensome, bureaucratic obligations for search within rather tight deadlines. This may be a requirement that is very difficult to be fulfilled, in particular for smaller CMOs, and those who have started work not very long ago and thus will have many of such cases to deal with.

3) Obligations by Directive regarding time limits for distribution of money to right holders

The Directive (Art. 13(1)) requires CMOs to distribute received revenues within nine months after the financial year terminated. There may be however cases where this deadline is difficult to fulfil, especially where authors are allowed to claim their shares within two or three years after the use took place, and money must be reserved for such cases longer than the above deadline.

4) Obligations by Directive regarding information to be provided

The rules of the Directive on transparency and reporting obligations (Arts 18 ff and in particular Annex to Art. 22) are quite far-reaching, detailed and may be very burdensome especially for smaller or younger CMOs, for which as a consequence administration costs will raise and thus revenues for right holders will be negatively affected.

5) System of online music licencing

That system has become problematic since the online music licencing Recommendation of the European Commission of 2005, in which it encouraged competition between CMOs within the EU in favor of right owners. The consequences have been that mainly major US music publishers have withdrawn their repertoire from most of the CMOs and granted them to a few platforms who offer their repertoire under a multiterritorial licence. The negative effect for the user is that such licences are available only for selected repertoire, and the user still has to get licences for other repertoire, but no longer may receive one licence for the world repertoire in each of the EU Member States. For authors, the negative effect consists of the concentration of the majors' repertoire with few platforms, and the loss of demand for niche repertoires and thus of the potential loss of cultural diversity, together with the loss of income for smaller CMOs in many Member States, and thus for a raise in administrative costs (less income, same overhead costs).

6) Payment in case of disputes regarding amount of remuneration for private copying

The German law on CMOs does not provide for an obligation of the debtor of payment for a statutory remuneration right to deposit the claimed or at least uncontroversial part of the payment in a neutral account, if the debtor rejects payment and engages in court proceedings. This situation is particularly embarrassing where court proceedings, such as regarding the remuneration for private reproduction, take ten or more years (as it has happened) and no payments are made in the meantime, and the debtor in that time may go bankrupt or the relevant company gets dissolved.

7) Considerations of "flexible", sweeping formulations of limitations in law

Currently, certain forces push the discussion of so-called "flexible" exceptions and limitations of authors' rights, such as under the US-concept of "fair use". In fact, a google-representative stated at a conference in New York in 2012 that google was satisfied to see these concepts spreading in the world and that it did not insist on naming such limitations "fair use" but for them it would be sufficient to see flexible exceptions and limitations in many countries. The reasons for google to lobby (even if not always visible) for such limitations are evident, if one only considers the mass digitization of books as an example. However, apart from many reasons that speak against this concept, it is also evident as regards the work of CMOs that such flexible, vague limitations do not match well with statutory remuneration rights, and even where a limitation is – though flexible – somewhat concrete, any connected statutory remuneration right will not be easy to manage by CMOs, since the debtors will always put into question their obligation to pay in the one or other (non-specified) case. This concept would also for the related remuneration right result in constant court proceedings, and thus costs for CMOs.

8) Basis for statutory remuneration in copyright acts

Experience in Germany with the 2008-amendment of the previous law regarding calculation of the remuneration for private reproduction has shown that that new system requires considerable efforts, eg, in form of studies on the actual use of devices and media in order to settle disputes on the appropriate amount of money to be paid by debtors. Such disputes may take very long.

9) Negative reputation of CMOs

In the public opinion, in some cases assisted by the media, CMOs do not enjoy the best reputation. For example, in case of tariff increases, the media are likely to create an atmosphere against the CMO. The law and practice of CMOs is often so complex that it is difficult to fully explain it to the general public. There is also a tendency to generalization of individual cases of wrong-doing (such as by a Spanish officer of a CMO).

Possible Solutions

1) Distribution of revenues among authors and derived right holders

Conventional solutions are in fact being pursued: as regards distribution on the basis of the current scheme: evaluation of all risks and consequential acting (distribution under a proviso; building of reserves from collected revenues for the case of wrong distribution, should the final court decision follow the "priority" principle); as regards the issue itself: defense in the pending court cases; trying to get a position from the supervisory authority (so

far without success, though). Out-of-the-box solution: encouraging the legislature to clarify the legal situation (so far without success).

2) **Obligations by Directive regarding unknown right holders (Art. 13 (3))**

Out of the box solution would be to provide for a transitional period, and to request an adaptation of the Directive if the burden remains too high. Otherwise, national supervision bodies might decide not to enforce the rules very strictly, not least in order to keep administration costs in a certain frame.

3) **Obligations by Directive regarding time limits for distribution of money to right holders**

Conventional solution (should be sufficient): CMOs will have to convince their Member States of the need to implement relevant exceptions to the rule, not only in the cases explicitly mentioned in the Directive, and to specify them.

4) **Obligations by Directive regarding information to be provided**

For CMOs, for which these obligations represent a serious burden in the sense that their administration costs would considerably raise to the detriment of right holders, a solution might be that other CMOs would subsidise/assist those CMOs or that governments would assist those CMOs for an initial period. Otherwise, the implementing laws might provide for transitional periods that would enable CMOs to establish an efficient system of collecting and preparing the required information.

5) **System of online music licensing**

So far, the market has not found a solution, and the legislature has not tried to reverse the Recommendation; the "softening" solution in Art. 30 of the Directive to compel CMOs that grant multiterritorial licences to accept the management also of repertoire of other CMOs may not be successful where the other CMOs are not inclined to offer their repertoire to the first-mentioned ones. An out-of-the-box solution would be a mandatory legislation at EU level to offer licences on the basis of the previously existing system of reciprocal agreements between CMOs and to make management via CMOs of the online music rights mandatory. However, this will hardly be a realistic solution.

6) **Payment in case of disputes regarding amount of remuneration for private copying**

The out of the box-solution as envisaged (see the 2coalition agreement" between both political parties of the current German government, p. 133) would be the introduction of a

legal obligation of debtors to deposit a certain amount per year of legal proceedings, so as to safeguard the claims by CMOs.

7) **Considerations of "flexible", sweeping formulations of limitations in law**

The most evident solution is to fight any attempts by governments and others to introduce such kinds of limitations, which would anyway not be consistent with the traditions of Continental European countries (and, depending on the degree of flexibility, not consistent with the three-step test) and thus to avoid such "flexible" rules by introducing or maintaining specific legislative rules on limitations and related statutory remuneration rights.

8) **The most obvious solution would be to choose criteria as before the amendment, or to indicate concrete amounts or ways of calculation in an order by the government to be adapted as needed more easily than the law itself.**

9) **Conventional solutions include better "marketing" of the services of CMOs, explanations to the public in different ways and means, campaigns on the need for CMOs and their tasks in favor of authors, better ways of communication, and practising transparency, so as to show that there is no basis for suspicion of wrong-doing. For such activities, there may be out of the box-ways of performing them.**